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# Zoning for the Mentally Ill: A Legislative Mandate

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# Zoning for the Mentally Ill: A Legislative Mandate

## **Abstract**

Under the aegis of President John Kennedy, Congress first began to concern itself with the needs of the mentally ill over two decades ago. Bills providing for community mental health centers and congregate housing have appeared subsequently to attempt to expedite integration of the mentally ill into community life. These congressional mandates, however, have met with reluctance-if not hostility. While federal law makers have been the champion of deinstitutionalization, they have placed responsibility for implementation of their programs on the state and local levels. There, local governmental authorities have reacted defensively to exclude the mentally ill from their neighborhoods, primarily by exclusionary zoning. In this Note, Ms. Schmedemann argues that state legislatures must endeavor to fulfill the broad mandates of deinstitutionalization set out by Congress. To that end, she proposes creation of statewide mental health agencies. Such programs, says Ms. Schmedemann, would not only assure federal financial assistance, but set up uniform land use patterns on the state level to avoid parochial local efforts to exclude group residences for the mentally ill.

## **Keywords**

exclusionary zoning, psychiatry, group residences, property law

## **Disciplines**

Housing Law | Law and Psychology | Law and Society | Property Law and Real Estate

# NOTE

## ZONING FOR THE MENTALLY ILL: A LEGISLATIVE MANDATE

DEBORAH A. SCHMEDEMANN\*

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In 1963, President Kennedy proposed to Congress and the American people a new national goal: "We must act," he urged "(t)o retain . . . and return to the community the mentally ill and mentally retarded,<sup>1</sup> [in order] to restore and revitalize their lives."<sup>2</sup>

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1 This Note focuses on exclusionary zoning of group residences for the mentally ill. Because legislatures and courts often have addressed the needs of the mentally ill and mentally retarded (or developmentally disabled) in tandem, group residences for the mentally ill often are mentioned in passing. The reader should not assume, however, that the analysis and conclusions of this Note may be applied to group residences for the mentally retarded. Indeed, differences in the clinical characteristics of the two groups may well argue for differences in legal treatment.

Also, this Note does not distinguish the mentally ill who have been institutionalized through civil commitment proceedings and those who have been adjudged criminally insane. That distinction is more properly considered in an analysis of commitment statutes.

For legal developments in the area of mental disability law in general, see MENTAL DISABILITY LAW REPORTER (ABA).

Finally, group residences are of course used in the rehabilitation of numerous groups—ex-offenders, ex-drug addicts, juvenile delinquents, etc. I do not pretend to analyze here the factual or legal issues raised by these different group residences, except to the extent that all group residences face the same basic obstacles in the community and among lawmakers.

2 President's Message to Congress on Mental Illness and Mental Retardation, [1963] U.S. CODE CONG. & AD. NEWS 1466 (Feb. 5, 1963).

Fifteen years later, the President's Commission on Mental Health reported that "ghettos" of the mentally disabled "destroy the residential character of the affected neighborhoods and subvert the right of handicapped persons to live in normal residential surroundings."<sup>3</sup>

Why has so noble an effort — the integration of the mentally ill into community life — been so unsuccessful? Of key importance has been exclusionary zoning. Local zoning ordinances have been written or construed to prohibit the establishment of group residences for the mentally ill in many residential areas, relegating the mentally ill to a city's least desirable neighborhoods or to life alone. Neither of these arrangements can be deemed restorative or revitalizing.

This Note undertakes several tasks. Part I surveys the conflicting interests of the mentally ill and residential communities. Part II first describes the conflicting reactions to date by the nation's lawmakers—local, state, and federal — and then proposes legislative solutions on the state level. Part III examines the contours of that solution, through a defense of its legal validity as a general matter, critical appraisal of existing legislation, and suggestions for future enactments.

## I. COMMUNITIES IN CONFLICT

Judge David Bazelon has appropriately described the tensions affecting the movement to integrate the mentally ill into community life. Says Bazelon:

On the one hand, we want to "protect ourselves" from these individuals and thereby end our discomfort. But, on the other hand, we want to protect them and ameliorate their suffering by helping and treating them. Too often the types of custody that make us feel more comfortable are *not* the best treatment or custody for these individuals.<sup>4</sup>

The problems of the mentally ill are indeed often reduced to

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3 U.S. PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT FROM THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, VOLS. II-IV: APPENDICES: TASK PANEL REPORTS, Appendix Vol. IV at 1390 (1978) [hereinafter cited as TASK PANEL REPORTS].

4 Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 897 (1975). Bazelon was writing about the criminally insane; his assessment, however, is equally applicable to the mentally ill who have been civilly committed.

an "us vs. them" situation, with the mentally ill and the mentally stable depicted as two distinct camps. But the image is overly simplistic. Mental illness remains a common phenomenon<sup>5</sup>; a 1977 federal report in fact maintains that ten percent of the American population is mentally ill.<sup>6</sup> Nonetheless, it is useful for purposes of analysis to view the mentally ill and the general public as distinct groups with separate interests to be protected in any resolution of the exclusionary zoning dilemma.

#### A. *The Mentally Ill: Deinstitutionalization*

The movement to return the mentally ill to the mainstream of American life spurred by President Kennedy has been labeled "deinstitutionalization." A recent federal report has defined the term as "the process of (1) preventing both unnecessary admission to and retention in institutions, [and] (2) finding and developing appropriate alternatives in the community for housing, treatment, training, education and rehabilitation of the mentally disabled."<sup>7</sup> The number of individuals immediately affected by deinstitutionalization has been and will continue to be significant. From 1958 to 1973, the patient population of state mental hospitals decreased by more than 300,000 with most of the released patients re-entering community life; in 1975, approximately 300,000 more remained in institutional settings.<sup>8</sup>

Contemporaneous medical advancements and shifts in treatment philosophy have prompted the recent move for deinstitutionalization within the psychiatric profession. During the 1950's, psychotropic drugs, which mitigate the bizarre behavior

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5 Mechanic, *Explanations of Mental Illness*, 166 J. NERVOUS & MENTAL DISEASES 381, 384 (1978). The origins of mental illness are unclear. Many psychiatrists view it as the capricious and unfortunate interaction of predispositional factors, social situation and personal history. For a general description of mental disorders, see Redlich & Kellert, *Trends in American Mental Health*, 135 AM. J. PSYCH. 22 (1978).

6 COMP. GEN. REP. TO CONGRESS, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE (Jan. 1, 1977) [hereinafter cited as RETURNING THE MENTALLY DISABLED].

7 *Id.*

8 S. REP. NO. 94-198, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. CODE CONG. & AD. NEWS 469, 540 (1975). The precise figures are 570,000 in 1957 to 248,564 in 1973. The Senate Report found that in 1975 over one million persons resided in state mental hospitals and nursing homes, and that institutional care was inappropriate for between one-quarter and one-third of that number.

patterns associated with some forms of mental illness, were developed, making life in the community a feasible option for the first time for a large number of mental patients.<sup>9</sup> Furthermore, psychiatrists became increasingly conscious of the debilitating impact of institutionalization itself.<sup>10</sup> The logic of treating the mentally ill in the community therefore seemed clean and strong. As one writer notes: "[T]reatment and support *in the community* — precisely where the patient needs help in adjusting — appears as an appropriate direction to follow."<sup>11</sup>

The components of an ideal system for integrating former mental hospital patients into the community are many and interrelated: a rehabilitation program to build or restore the patient's employment skills, psychiatric care, social support services and — of key importance — a residential placement in the community.<sup>12</sup> Residential placements come in many forms, reflecting the differing needs and functional levels of patients. A highly independent patient may be able to live alone upon release from the institution, with a foster family, or with several other patients in a cooperative apartment setting.<sup>13</sup> For the less independent patient, a more appropriate placement may be the "therapeutic community" of a group residence, where a small group of mentally ill persons live together as a "surrogate family" under the guidance of live-in house staff.<sup>14</sup>

9 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 2.

10 The seminal treatise is E. GOFFMAN, *ASYLUMS* (1961). See also the texts of the right to treatment cases, notes 71 to 86 *infra*. The debilitating impact has been documented in e.g., Stein, Test & Marx, *Alternatives to the Hospital: A Controlled Study*, 132 AM. J. PSYCH. 517 (1975).

11 Marx, Test & Stein, *Extrahospital Management of Severe Mental Illness: Feasibility and Effects of Social Functioning*, 29 ARCH. GEN. PSYCH. 505, 505 (1973) [hereinafter cited as Marx].

12 See H. LAMB, *COMMUNITY SURVIVAL FOR LONG TERM PATIENTS* (1976) [hereinafter cited as LAMB] for a more comprehensive description of a complete community-based mental health system.

13 None of these residential placements is likely to encounter zoning obstacles. For a description of the cooperative apartment model, see Chien & Cole, *Landlord-Supervised Cooperative Apartments: A New Modality for Community-Based Treatment*, 130 AM. J. PSYCH. 156 (1973).

14 A more complete description of a group residence is:

The halfway house is essentially a therapeutic community with an environment that has been organized to maximize the therapeutic potential of all the components. These elements include the physical surroundings, the attitudes and behavior of staff, the resident-to-staff and resident-to-resident interactions, and all activities, including such routine tasks as preparing and eating meals and doing daily clean-up chores. . . .

Over the years, group residences have constituted an integral and apparently successful link in systems aimed at integrating the mentally ill into community life. Although it is difficult to quantify improvement in an individual's mental health, it does appear that placement in a group residence operates to the benefit of patients released from institutions.<sup>15</sup> The relapse rates (frequency of readmission to the institution) for patients placed in group residences are believed to be no higher than and in some cases lower than those for patients released without such a placement.<sup>16</sup> Studies further indicate that group residences are particularly successful in terms of how well patients fare in the community.<sup>17</sup> Finally, some psychiatrists have argued that, even absent such relatively quantifiable factors as reduced relapse rates and improved functioning, community life in a group residence is preferable over life in an institution for the simple reason that it is more humanly satisfying.<sup>18</sup>

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[T]he residents are able to experiment with additional responsibility, learn and test new attitudes and behaviors, and develop constructive social relationships. The staff play a nondirective, facilitative role, using appropriate role modeling and reinforcement and encouraging the residents' initiative.

The therapeutic community approach is implemented primarily in two ways: first, in the informal, family-like relationship in the residents' house . . . and second, in the structured activities. . .

Beigel, Hollenbach, *et al.*, *Practical Issues in Developing and Operating a Halfway House Program*, 28 HOSP. & COMM. PSYCH. 601, 601 (1977). See also Jansen, *The Role of the Halfway House in Community Mental Health Programs in the United Kingdom and America*, 126 AM. J. PSYCH. 1498 (1970) [hereinafter cited as Jansen].

For a description of a group residence from the perspective of the legal system, see *Township of Wash. v. Central Bergen Community Mental Health Center, Inc.*, 156 N.J. Super. 388, 383 A.2d 1194 (1978) [hereinafter cited as *Township of Washington*].

15 This result assumes that the group residence conforms to the model of a group residence as a therapeutic community. Clearly, group residences which lack the necessary funding, community support, and neighborhood stability contemplated by the model are less likely to prove beneficial to their residents.

16 For surveys of recent studies, see Bachrach, *A Note on Some Recent Studies of Released Mental Patients in the Community*, 133 AM. J. PSYCH. 73 (1976); Rog & Rausch, *The Psychiatric Halfway House: How Is It Measuring Up?*, 11 COMM. MENTAL HEALTH J. 155 (1975).

17 *E.g.*, Linn, Caffey, Klett & Hogarty, *Hospital vs. Community (Foster) Care for Psychiatric Patients*, 34 ARCH. GEN. PSYCH. 78 (1977); Lamb & Goetzl, *Discharged Mental Patients — Are They Really in the Community?*, 24 ARCH. GEN. PSYCH. 29 (1971).

18 R. GLASSCOTE, ET AL., *HALFWAY HOUSES FOR THE MENTALLY ILL* (Joint Information Service of the American Psychiatric Association and the National Association for Mental Health 1971).

### B. *The Mentally Stable: Self-Protectionism*

As Judge Bazelon has noted, the attitude of the general public toward the mentally ill is ambivalent.<sup>19</sup> In the abstract, most Americans are likely to be solicitous of the mentally ill and desirous of improving their plight.<sup>20</sup> Yet, when the issue becomes more immediate and concrete, *i.e.*, when aiding the mentally ill entails admitting them into one's own community, altruism fades and self-protectionist attitudes emerge. Expressed and "unexpressed but patently recognizable"<sup>21</sup> fears motivate communities to exclude group residences from within their borders. The fears may be real; but the grounds for them appear to be, for the most part, unrealistic. While a given community's concern no doubt is multifaceted and complex, it is useful for analytical purposes to examine two causes of this reluctance: resistance to the group residence and resistance to the residents.

Legal challenges to group residences, regardless of the identity of the occupants, frequently claim that the residence's social and physical structure is incompatible with the character of the neighborhood. Reluctant neighbors view group residences as mini-institutions<sup>22</sup> or as pseudo-correctional institutions.<sup>23</sup> They cite with apprehension the overcrowding,<sup>24</sup> disruption,<sup>25</sup> and undermining of the neighborhood's family character<sup>26</sup> which in

19 See note 4 *supra*.

20 At least, this has been one of the operating premises of much of the federal legislation supporting deinstitutionalization. See the legislative history of the federal legislation discussed in text accompanying notes 42 to 71 *infra*.

21 *Township of Washington*, *supra* note 14, at 395.

22 *E.g.*, *Berger v. State*, 71 N.J. 206, 34 A.2d 993 (1976) (multihandicapped children) [hereinafter cited as *Berger*]. Cf. *Browndale International Ltd. v. Board of Adjustment for County of Dane*, 60 Wisc. 2d 182, 208 N.W.2d 121 (1973), *cert. denied*, 416 U.S. 936 (1974) (complex of six homes for emotionally disturbed children) [hereinafter cited as *Browndale International*].

23 *E.g.*, *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. 1975) (male juvenile delinquents); *Crist v. Bishop*, 520 P.2d 196 (Utah 1974) (boys with mental or emotional problems).

24 *E.g.*, *Y.W.C.A. of Summit v. Board of Adjustment*, 134 N.J. Super. 384, 341 A.2d 356 (1975), *aff'd*, 141 N.J. Super. 315, 358 A.2d 211 (1976) (twelve girls); *City of Newark v. Johnson*, 175 A.2d 500 (N.J. 1961) (state wards).

25 *E.g.*, *Little Neck Community Ass'n v. Working Organization for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 264 (1976) (mentally retarded children); *Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster*, 580 P.2d 1246 (Colo. 1978) (mentally retarded) [hereinafter cited as *Adams County*].

26 *E.g.*, *Hessling v. City of Broomfield*, 563 P.2d 12 (Colo. 1977) (mentally retarded



their view inevitably attend a group residence. These apprehensions, however, stem from a misconception of the structure and operations of a group residence. The very premise of a group residence is to serve its occupants by providing for them an inconspicuous, normal, family-like environment.<sup>27</sup> As one state supreme court wrote of a group residence for the mentally retarded, group homes are "consonant with, not destructive of, the residential nature of the community."<sup>28</sup>

A second class of concerns, often unstated, derives from the attribute of the residents themselves — mental illness. It is almost a truism that the disturbed are disturbing to the sane.<sup>29</sup> A recent study exploring the reactions of landlords to potential tenants found that a background of mental illness results in a stigma comparable to that created by a prison record.<sup>30</sup> In many cases, the uneasiness appears to stem not from an actual encounter with a mentally ill individual, but from an abstract stereotype, a stereotype which is usually disproven by actually meeting him.<sup>31</sup> Although attitudes are becoming more accepting,<sup>32</sup> it appears that the uninformed public often imagines mental illness only in its most acute forms; accordingly, providing information about the various types and magnitudes of mental illness may ease the fear.<sup>33</sup>

Eliminating preconceptions, however, is unlikely to prove easy. For some, the nebulous sense of discomfort produced by potential contact with the mentally ill stems from an ingrained

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children); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (neglected children) [hereinafter cited as *City of White Plains*].

27 See note 14 *supra*.

28 *Adams County*, *supra* note 25, at 1250.

29 E.g., Fracchia, Sheppard, et al., *Public Perceptions of Ex-Mental Patients*, 66 AM. J. PUB. HEALTH 74 (1976) [hereinafter cited as Fracchia]; Aviram & Segal, *Exclusion of the Mentally Ill: Reflections on an Old Problem in a New Context*, 29 ARCH. GEN. PSYCH. 126 (1973) [hereinafter cited as Aviram]; Gove & Fain, *The Stigma of Mental Hospitalization: An Attempt to Evaluate Its Consequences*, 28 ARCH. GEN. PSYCH. 494 (1973) [hereinafter cited as Gove].

30 Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation*, 9 CANADIAN J. BEHAVIORAL SCIENCES 85 (1977).

31 Gove, *supra* note 29.

32 Fracchia, *supra* note 29.

33 Aviram, *supra* note 29.

Uneasiness towards the mentally ill is analogous to racial discrimination in interesting ways. For a thought-provoking analysis of the legal implications of the similarity, see Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

belief that the mentally ill are more dangerous than the mentally stable. For many, this conviction is based on nothing more than a belief that the mentally ill have a penchant for unpredictable behavior. Whether there is a correlation between mental illness and crime and violence (*i.e.*, whether the mentally ill as a group are more prone than the general public to violence, given identical environments) remains an unanswered question.<sup>34</sup> The American Psychiatric Association estimates that no more than ten percent of the hospitalized mentally ill qualify as "dangerous,"<sup>35</sup> and presumably, the percentage would be significantly less among patients released to life in the community, since the ability to function well in the community is a primary prerequisite for that release.<sup>36</sup>

Legal challenges to group residences also raise neighborhood property values as a distinct interest deserving protection.<sup>37</sup> Whether the monetary value of a piece of property is or should be legally cognizable standing alone is questionable.<sup>38</sup> In this context, at least, the property interest of reluctant neighbors, if indeed imperiled by the establishment of a group residence, is threatened only because of the fears described above. Thus, to the extent those fears are unrealistic, the validity of concern with property value diminution is undermined. In fact, at least

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34 The difficulty in establishing or refuting the correlation lies in isolating the mental illness factor out of a very complex context. One study which did find a higher arrest rate for former mental patients (from Bellevue in New York City) than for the general public explained the results in part by citing the higher-than-average incidence of past criminal records among the patients studied and noted that "[t]he provision of suitable community facilities for treatment, supervision, or follow-up has not kept pace with the needs generated by the discharge of large numbers of mental hospital patients and by more restrictive admission policies." Zitrin, Hardesty, et al., *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCH. 142, 147 (1976). For a survey of recent studies on the issue, see Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 AM. J. PSYCH. 33 (1978).

35 A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 27 (1976).

36 See note 14 *supra*.

37 *E.g.*, *Adams County*, *supra* note 25; *Township of Washington*, *supra* note 14; *Nicholson v. Connecticut Half-Way House, Inc.*, 218 A.2d 383 (Conn. 1966) (parolees) [hereinafter cited as *Nicholson*].

38 *Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1460-62 (1978) [hereinafter cited as *Developments-Zoning*].

one study has found that property values remain undisturbed once a group residence has been established for the mentally ill.<sup>39</sup>

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The drama underlying exclusionary zoning of group residences for the mentally ill thus is built upon a fundamental conflict between two communities. The interest of the mentally ill, clinically and on a societal level, is served when they are a part of the mainstream of American life. Yet many American communities more generally perceive it to be in their best interest to exclude the mentally ill from their particular borders. One may well doubt, however, whether the perceptions of the general public are valid; indeed, at least some communities actually faced with accommodating group residences for the mentally ill have found themselves quite able and, ultimately, willing to do so.<sup>40</sup> As one psychiatric professional has observed, the establishment of a group residence in a community may well benefit the community by prompting it to "recognize its likeness to the disturbed rather than its unlikeness and take back some of the projections that isolated the patient and impoverished the community before."<sup>41</sup>

## II. GOVERNMENTS IN CONFLICT

Tension between the mentally ill and the mentally stable residents of America's communities has been particularly evident in the legislative struggle over mental health laws. Broadly speaking, federal lawmakers have been the champions of deinstitutionalization, while local lawmakers, *e.g.*, zoning authorities, generally have acted to exclude the mentally ill from their particular jurisdictions, in accordance with the desires of their limited and insular constituencies. Until recent-

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39 THE SOCIAL IMPACT OF GROUP HOMES: A STUDY OF SMALL RESIDENTIAL SERVICE PROGRAMS IN RESIDENTIAL AREAS, GREEN BAY PLANNING COMMISSION (1973), *cited in* LAMB, *supra* note 12, at 52.

40 Marx, *supra* note 11.

41 Jansen, *supra* note 14, at 1498.

42 For a more detailed description of federal activity furthering deinstitutionalization through 1976, *see* RETURNING THE MENTALLY DISABLED, *supra* note 6.

ly, states have either abdicated their role or displayed more sympathy with local governments opposing integration than with the receptive stance of the federal government.

A. *Federal Law: Facilitating Deinstitutionalization*

The response of federal lawmakers to President Kennedy's 1963 call for a national effort to return the mentally disabled to life in the community has been resounding and affirmative.<sup>42</sup> In only 14 years, legislation and executive orders had resulted in 135 programs operated by eleven federal departments and agencies for the needs of the mentally ill, with an emphasis on life in the community.<sup>43</sup> At the same time, some segments of the federal judiciary have begun to formulate a legally cognizable "right" on the part of the mentally ill to certain forms of treatment and self-determination, including integration into the community.<sup>44</sup>

1. Legislation

On the federal level, funding aimed at furthering deinstitutionalization has come to provide a wide range of government services, commensurate with the range of the needs of the mentally ill. "Mentally disabled persons frequently have a variety of needs, including housing, income support, mental health and medical care, education, vocational training, employment and social services."<sup>45</sup>

The foundation of federal deinstitutionalization efforts — historically, conceptually and in terms of practical operations —

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43 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 5. The burden of providing for the various needs of the mentally ill in institutions remains for the most part on the states, the traditional primary providers of institutional care. For a description of the state/federal scheme of mental health care, see NAT'L INST. OF MENTAL HEALTH, FINANCING MENTAL HEALTH CARE IN THE UNITED STATES: A STUDY AND ASSESSMENT OF ISSUES AND ARRANGEMENTS (1973) [hereinafter cited as FINANCING MENTAL HEALTH CARE].

Admittedly the course of federal activity here has been somewhat uneven, reflecting shifts in the nation's economic welfare and philosophical views. See the history of the Community Mental Health Centers legislation described in S. REP. No. 94-198, *supra* note 8. Throughout the past few decades, nonetheless, the direction of federal legislation has been unswervingly pro-deinstitutionalization.

44 See text accompanying notes 72 to 87 *infra*.

45 RETURNING THE MENTALLY DISABLED, *supra* note 6, at 172.

is the community mental health centers network (CMHC). Congress first authorized funds to aid states in the establishment of community mental health centers in 1963,<sup>46</sup> and has amended the program several times since then to increase its appropriations and expand the range of services offered by the centers.<sup>47</sup> In the CMHC legislation, Congress has emphasized the role of the community in mental health treatment not only by providing for treatment facilities which are oriented toward a specific community,<sup>48</sup> but also by positing its major objective to "discourage the inappropriate placement of persons in inpatient facilities."<sup>49</sup> Of particular importance to the group residence component of deinstitutionalization is the requirement that one of the services provided by a center be "a program of transitional halfway house services."<sup>50</sup> Appropriations for these programs for fiscal year 1980 total approximately \$65 million.<sup>51</sup>

The CMHC program is augmented by Title XX, enacted in 1975,<sup>52</sup> a broad program that provides for federal reimbursement of state expenditures directed at the goals of "achieving or maintaining self-sufficiency" and "preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive

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46 Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

47 See Community Mental Health Centers Extension Act of 1978, Pub. L. No. 95-622, 92 Stat. 3412 (1978), S. REP. NO. 95-838, 95th Cong., 2nd Sess. (1978) *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 9042, for a summary of the various changes. The legislation currently in effect is found at 42 U.S.C.A. §§ 2689 *et seq.* (1979 Supp.).

48 The scheme of the legislation is to divide the nation into approximately 1500 areas, each of which is to be served by its own CMHC. As of 1977, 675 CMHCs have been funded, 592 of which were fully operational; forty-four percent of the American population was covered. S. REP. NO. 95-838, *supra* note 47, at 9046.

49 S. REP. NO. 94-198, *supra* note 8, at 540.

50 42 U.S.C.A. § 2689(b)(1)(B)(iv) (1970). This requirement becomes effective three years after the establishment of a new CMHC. As of the date of establishment, a CMHC must provide inpatient, emergency and outpatient services; screening assistance to courts and public agencies; follow-up care; consultation and education services. Three years later, the CMHC must provide, in addition to halfway houses, day care and partial hospitalization; services for children; services for the elderly; alcoholism and drug abuse programs (as needed). CMHCs not providing the second group of services initially must provide a plan for their phase-in within three years. 42 U.S.C.A. § 2689 (1970).

51 42 U.S.C.A. §§ 2689a-2689d (1970).

The CMHC system's theory and operations have been examined critically in F. CHU & S. TROTTER, *THE MADNESS ESTABLISHMENT: THE NADER REPORT* (1974).

52 Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 42 U.S.C.A. §§ 1397(a) *et seq.* (1979 Supp.).

care.”<sup>53</sup> Reference to the list of services suggested for funding under Title XX “demonstrates the program’s intent to address the daily needs of former mental patients in the community.”<sup>54</sup> Those programs are comprehensive and cover “services for . . . adults in foster care, day care services for adults, transportation services, training and related services, employment services, referral, and counseling”<sup>55</sup> and others, to the exclusion of medical care and residential expenses of institutionalization in a mental hospital.<sup>56</sup>

Congress very recently has attempted to facilitate the establishment of group residences for the mentally ill in terms of housing legislation. Federal law for some time has provided housing support for the handicapped in the form of loans to public housing agencies and other developers.<sup>57</sup> In 1978, Congress directly addressed the group residence model in the Congregate Housing Services Act of 1978.<sup>58</sup> The Act provides for contracts between the Department of Housing and Urban Development and local housing agencies or nonprofit corporations for the provision of services “to promote and encourage maximum independence within a home environment for such residents capable of self-care with appropriate supportive congregate services.”<sup>59</sup> The statement of Congressional findings prefatory to the legislation evinces the strong commitment of Congress to group residence programs:

[C]ongregate housing, coordinated with the delivery of supportive services, offers an innovative, proven, and cost-effective means of enabling temporarily disabled or handicapped individuals to maintain their dignity and independence and to avoid costly and unnecessary institutionalization.<sup>60</sup>

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<sup>53</sup> 42 U.S.C.A. § 1397a(a)(1) (1975).

<sup>54</sup> See also the federal support of state vocational rehabilitation programs, 29 U.S.C.A. §§ 701 *et seq.* (1979 Supp.).

<sup>55</sup> *Id.*

<sup>56</sup> 42 U.S.C.A. § 1397a(a)(7)(e), 42 U.S.C.A. § 1397a(a)(11) (1970).

<sup>57</sup> 12 U.S.C.A. 1701q (1970 Supp.). Until 1974, only physically handicapped persons were covered by this program; Housing & Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 669 (1974), deleted that limitation.

<sup>58</sup> Pub. L. 95-557, 92 Stat. 2104, 42 U.S.C.A. §§ 8001 *et seq.* (1978).

<sup>59</sup> 42 U.S.C.A. § 8003 (1978).

<sup>60</sup> 42 U.S.C.A. § 8001. For further elaboration, see the legislative history *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4773.

Not all federal funding of community housing for the mentally ill, however, disburses funds via state and local providers. The major program channeling financial support directly to individual former mental hospital patients is Supplemental Security Income.<sup>61</sup> Although SSI benefits, which are in essence subsistence payments,<sup>62</sup> generally are available only at a reduced level or not at all to persons residing in treatment facilities,<sup>63</sup> patients living in "publicly operated community residence[s] which [serve] no more than 16 residents" are eligible for full benefits under the program.<sup>64</sup> The SSI payment scheme thus evinces an assessment by federal legislators that group residences are distinguishable in salient ways from other treatment facilities and that group residences are a valuable mechanism for treatment of the mentally ill.

Federal funding operates to induce states to establish group residences as one component of a community-based mental health system. Under the federal system,<sup>65</sup> grants are predicated on the state's efforts in the community mental health sphere. Thus, for example, a state plan "to eliminate inappropriate placement in institutions of persons with mental health problems [and] to insure the availability of appropriate noninstitutional services"<sup>66</sup> is a prerequisite to the receipt of health care revenue sharing monies in general. Similarly, applications by local agencies for federal aid for community development must include state housing plans that survey and assess the housing stock and needs of the handicapped.<sup>67</sup>

Complementing the funding legislation described above is Section 504 of the Rehabilitation Act of 1973.<sup>68</sup> Section 504 constitutes a limited civil rights act for the handicapped:

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61 42 U.S.C.A. § 1381 *et seq.* (1979 Supp.).

62 42 U.S.C.A. § 1382(b).

63 42 U.S.C.A. § 1382(e)(1)(A), (B).

64 42 U.S.C.A. § 1382(e)(1)(C).

65 The benefits for the mentally ill being treated in the community under Medicare and Medicaid are fairly limited: Medicare payments are limited to the lesser of \$312.50 or 6½% of the patient's annual outpatient expenses. 42 U.S.C.A. § 1395i (1979 Supp.). And Medicaid requirements vary according to the patient's age, as well as type of treatment facility and administering state. 42 U.S.C.A. § 1395(l) (1979 Supp.).

66 42 U.S.C.A. § 246(d)(2)(D)(i)(I) (1978 Supp.).

67 42 U.S.C.A. § 5304(a)(4) (1979 Supp.).

68 Pub. L. No. 93-112, 87 Stat. 393, *as amended by* Pub. L. No. 95-602, 92 Stat. 2982, 29 U.S.C.A. §§ 793, 794 (1979 Supp.).

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .<sup>69</sup>

An individual qualifies for the protection of the provision if he actually has, or is perceived as having, "a physical or mental impairment which substantially limits one or more of such person's major life activities."<sup>70</sup> Although the magnitude of Section 504's impact is yet to be measured or defined,<sup>71</sup> the tenor of its mandate is unmistakable: absent compelling cause, the handicapped — including the mentally ill — are not to be treated differently than the general public.

## 2. Judicial Action

An important development in mental disability law during the deinstitutionalization era has been the success of mentally ill plaintiffs challenging the fact or conditions of their treatment in state mental health systems.<sup>72</sup> In terms of the group residence

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<sup>69</sup> 29 U.S.C.A. § 794.

<sup>70</sup> 29 U.S.C.A. § 706.

The implementation regulations of the Department of Health, Education and Welfare further define "mental impairment" as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3.

<sup>71</sup> The practical impact of Section 504 likely will depend on the stringency of the regulations set forth by the various agencies and on the sanctions applied in cases of noncompliance. The Department of Health, Education and Welfare's regulations, 45 C.F.R. Part 85, 43 C.F.R. § 213.2 (Jan. 13, 1978) are to serve as the model for the other agencies. See Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973*, 6 FORDHAM URB. L.J. 399 (1978). The most immediately effective enforcement mechanism likely will be termination of federal support, as provided for in Exec. Order No. 1194, 41 Fed. Reg. 17871 (Apr. 28, 1976).

The primary legal issue is the role of the courts in effectuating the broad language of Section 504, e.g., does it imply a private cause of action? May a court review de novo the determination of an administrative agency? *E.g.*, *Doe v. Colautti*, 454 F. Supp. 621 (D. Pa. 1978) (the court assumes without deciding that Section 504 creates a private cause of action, and still finds no unlawful discrimination in a state medical insurance plan which differentiates between general and psychiatric hospital care); *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1978) (court refuses a trial de novo, limiting its role to a review of the administrative agency's findings by the traditional criteria; HEW had found a violation of Section 504 in the defendant's plan to move its facilities from the inner city to the suburbs and had negotiated a compliance plan which the court found adequate).

<sup>72</sup> See generally the decisions noted in MENTAL DISABILITY LAW REPORTER, note 1 *supra*.



movement, such litigation has produced far-reaching results by way of both legal theory — *i.e.*, the construction by certain activist judges of the “rights” of the mentally disabled to treatment — and judicial mandates on state mental health systems to provide residential treatment services.<sup>73</sup> Whether the analytical basis of these decisions is sound as a matter of law remains an open question<sup>74</sup> (and beyond the scope of this essay); yet their practical impact remains strong.

Three suits spanning the 1970s constitute the clearest successes by the mentally ill to secure judicial action resulting in the provision of adequate group residence services.<sup>75</sup> In the 1971 landmark case of *Wyatt v. Stickney*,<sup>76</sup> Judge Frank Johnson found a violation of due process in Alabama’s practice of confining mentally retarded and mentally ill persons for therapeutic reasons in state institutions when no adequate treatment was provided.<sup>77</sup> He ordered and subsequently monitored a program of extensive reform.<sup>78</sup> Several years later, the residents of Washington, D.C.’s St. Elizabeth’s Hospital brought suit alleging unlawful failure on the part of the District to provide adequate community residential services.<sup>79</sup> In *Dixon*

73 See text accompanying notes 75 to 87 *infra*. A systematic discussion of the evolution of these rights is provided in NAT’L ASSOC. OF ATTYS GEN., *THE RIGHT TO TREATMENT IN MENTAL HEALTH LAW* (February 1976).

74 The main ground for doubt is *O’Connor v. Donaldson*, 422 U.S. 563 (1975), discussed in text accompanying notes 85 to 87 *infra*. Legal scholars seem to be more favorably disposed towards the development than is the Supreme Court. According to TASK PANEL REPORTS, *supra* note 3, at 1422, at least fifty law review articles have been written on the subject, most concurring with the activist courts as a matter of law or policy. A fairly comprehensive analysis is found in a law review symposium in 62 U. CAL. — BERKELEY L. REV. 617 (1974).

75 For parallel developments regarding the mentally retarded, see *Evans v. Washington*, 459 F. Supp. 483 (D.D.C. 1978); *Halderman v. Pennhurst*, 446 F. Supp. 1295 (E.D. Pa. 1977) and 451 F. Supp. 233 (E.D. Pa. 1978) (extensive discussion of the rights to treatment and habilitation); *New York State Ass’n for Retarded Citizens v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

76 325 F. Supp. 781 (M.D. Ala. 1971).

77 *Id.* at 785.

78 *Id.* at 785-86. For subsequent opinions attempting to implement the reform, see *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971); 344 F. Supp. 373 (M.D. Ala. 1972); *affd. sub. nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

79 The District of Columbia has spawned a long series of important cases in the right to treatment area; read together they provide insight into the evolution of the right. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (petition for habeas corpus by an indigent senile patient committed as insane; held the District’s mental health code conferred a right to have alternatives to the institution evaluated); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (petition for habeas corpus by criminal defendant acquitted by

*v. Weinberger*,<sup>80</sup> the D.C. district court agreed with the plaintiffs, relying on the District's mental health code,<sup>81</sup> and, after noting that "housing . . . is integrally related to 'treatment,'" <sup>82</sup> ordered the District's social services agencies and the hospital to provide the missing services under the court's continued supervision.<sup>83</sup> More recently, a federal district court in Massachusetts approved a consent decree in the case of *Brewster v. Dukakis*,<sup>84</sup> which requires the state's department of mental health to provide an adequate community residence network for patients served by one of the state's mental hospitals.

The Supreme Court has been much more conservative than the lower federal courts in its examination of the interests of the mentally ill in community life. Thus far, it has refused to validate the theory asserted by the lower courts that the mentally ill have a right to treatment generally, much less a right to treatment in the least restrictive alternative.<sup>85</sup> When presented with the opportunity to do so in *O'Connor v. Donaldson*,<sup>86</sup> the Court opted for a holding based on the liberty interest, stating, "a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible

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reason of insanity; held the defendant held a statutory right to treatment); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) (petition for habeas corpus by patient in the hospital's maximum security ward; held that the principle of the least restrictive alternative applies to the choice of treatment modes within an institution).

80 405 F. Supp. 974 (D.D.C. 1975).

81 D.C. CODE ANN. § 21-562 (1973): "A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."

82 405 F. Supp. at 979.

83 *Id.*

84 D. Mass., Ct. No. 76-4423, filed Dec. 15, 1976. Among the grounds alleged by the plaintiffs are Massachusetts law, the federal legislation described in text accompanying notes 45 to 70 *supra*, and the first, eighth, ninth and fourteenth amendments.

85 Chief Justice Burger expressly suggests that the right to treatment theory suffers from serious flaws in his concurring opinion in *O'Connor v. Donaldson*, *supra* note 74. See note 86 *infra*.

86 422 U.S. 563. The case concerned a patient who had been civilly committed and kept involuntarily in a state mental institution for fifteen years without treatment. The Court could have viewed the case as a right to treatment case or as a test of civil commitment standards; it seems to have chosen the latter approach. For a survey of the states' civil commitment standards as of 1974, see *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974); for updates, see MENTAL DISABILITY LAW REPORTER, note 1 *supra*.

family members or friends.”<sup>87</sup> Although the language clearly stopped short of recognizing a constitutional right, it at least appeared to contemplate a place in the community for the mentally ill.

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In general, then, the deinstitutionalization movement has garnered considerable support among federal lawmakers. Although it is untenable to assert that the place of the mentally ill in the community is constitutionally protected, some segments of the federal judiciary have recognized an entitlement on the part of the mentally ill to adequate treatment in the community. More important perhaps in practical terms, Congress has exercised its powerful funding incentive to prompt states to provide group residence services for their mentally ill citizens.

### B. Local Law: *Exclusionary Zoning*

As federal legislation and judicial activism have attempted to facilitate integration of the mentally ill into community life, local government authorities have reacted defensively to exclude the mentally ill from their neighborhoods. The primary defense mechanism has been exclusionary zoning of group residences for the mentally ill.<sup>88</sup>

The zoning power of local governments generally derives

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<sup>87</sup> 422 U.S. at 576.

<sup>88</sup> At least, exclusionary zoning has given rise to the most litigation in the field. For an example of an alternative method of exclusion, see *Stoner v. Miller*, 377 F. Supp. 177 (E.D.N.Y. 1974) (successful challenge to a local ordinance barring registration of persons requiring continuous medical or psychiatric services in boarding houses). Private citizens may also use legal mechanisms to exclude group residences; see *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (Ct. App. 2d Div. 1972) (restrictive covenants may prohibit the establishment of a group residence) [hereinafter cited as *Seaton*]; *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d 571 (Ct. App. Fla. 1975), *on remand*, 332 So. 2d 610 (1976) (zoning and nuisance challenge to home for mentally retarded) [hereinafter cited as *Hillsborough*]; *Nicholson*, *supra* note 37 (unsuccessful nuisance suit against a home for parolees).

For the perspective of mental health professionals on zoning as only the latest in a long line of methods of excluding the mentally ill from community life, see Aviram, *supra* note 29; Cupaiolo, *Community Residences and Zoning Ordinances*, 28 HOSP. AND COMM. PSYCH. 206 (1977) [hereinafter cited as Cupaiolo].

from state zoning enabling acts:<sup>89</sup> these acts delegate a measure of the state's police power to municipalities in order to promote the "health, safety, . . . [or] general welfare of the community"<sup>90</sup> through property use planning and regulation. Zoning affords local governments considerable latitude in regulating (or prohibiting) the establishment of group residences for the mentally ill, in part because the permissible purposes of zoning ordinances are phrased in very broad terms by statute,<sup>91</sup> and in part because the standards for judicial review of zoning ordinances and their operation are less than rigorous.<sup>92</sup>

Often communities have used this latitude<sup>93</sup> to exclude group residences for the mentally ill from those areas, *e.g.*, single family residential districts, most appropriate to their purposes and operation.<sup>94</sup> Methods of exclusion range from the blatant to

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89 Every state has a zoning enabling act; alternative sources of the power to zone are state constitutions and home rule charters. Even when the latter exist, the enabling act is looked to in defining the scope of local authority. V. ROHAN, ZONING AND LAND USE CONTROLS §§ 32.02-.05, 35.03-.05 (1978) [hereinafter cited as ROHAN].

90 U.S. DEP'T. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, S. 1 (1926). (The model statute is the basis for most state zoning enabling acts.)

91 The Standard State Zoning Enabling Act lists the following as permissible objectives: to lessen congestion; to secure safety from fire, panic and other dangers; to promote the health and general welfare of the community; to provide adequate light and air; to prevent overcrowding of land and undue concentrations of people; to facilitate the adequate provision of public services such as transportation, water, sewage, schools, parks. *Id.* For descriptions of how these objectives have been construed, see ROHAN, *supra* note 89, §§ 34.01-43.03; *Developments — Zoning*, *supra* note 38, at 1443-62.

92 In an early case approving the mechanism of zoning in general, the United States Supreme Court set forth the constitutional standard applicable to zoning ordinances: that they not be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

ROHAN, *supra* note 89, at S. 36.05, defines the scope of judicial review here as "limited to a determination whether the record shows a reasonable basis for the action of the zoning authorities. If the reasonableness of the ordinance is fairly debatable, the administrative action will not be disturbed. A court will interfere only where the ordinance, either in its language or application, is clearly arbitrary or unreasonable, or where it violates due process or equal protection guarantees. The courts will also review governmental action that involves alleged abuses of discretion or overuse of power or errors of law. The meaning of certain words or terms in zoning questions is a question of law for the courts. Moreover, courts must construe statutes in such a way as not to deprive persons of important rights, and to avoid an unconstitutional or irrational result."

93 Not all communities are afforded complete free rein here; see text accompanying notes 109 to 132, 148, 182 to 199 *infra*.

94 See note 14 *supra*.

the sophisticated. Paradigmatic of the former is an ordinance of Boston, Massachusetts, which expressly designates halfway houses for the mentally ill as forbidden uses in most residential districts.<sup>95</sup> Probably more typical are ordinances which prohibit group residences by defining "family" (as in "single family residential") to exclude the social unit composed of a group of unrelated mentally ill adults and their house staff.<sup>96</sup> For example, an ordinance of White Plains, New York, defines a family as an individual plus his or her spouse, children, parents or other specified relatives living together as a single housekeeping unit.<sup>97</sup> A third, procedural, technique which may operate to exclude an undesired group residence from a neighborhood often overlays the other methods. Group residences may be allowed as a special use if they qualify for a special use permit, the requisites of which are within the discretion of local zoning administrators (who, sensitive to local pressures, may well impose prohibitively stringent requirements).<sup>98</sup> Whether the method of exclusion is intentional or fortuitous,<sup>99</sup> apparent on the face of the ordinance or only as applied, the result is the same — an effective barrier to group residences.

### C. *Inefficacy of Judicial Action and the Need for State Legislation*

The burden of reconciling the federal government's directive to deinstitutionalize the mentally ill and the local governments' practice of exclusionary zoning rests with the states. Not only do the states occupy the middle ground between the federal and local governments, they also constitute the major provider of

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95 Boston Zoning Code, Use Item No. 23.

96 For a more detailed description of the various types of family definitions and an analysis of their applications to group residences, see Wildgen, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 KANSAS L. REV. 677 (1976).

97 Cited in *City of White Plains*, *supra* note 26.

98 For descriptions of how the special use permit may be used to block the establishment of an undesired facility in an area, see Aviram, *supra* note 29; Mile Square Service Corp. v. City of Chicago Zoning Bd. of Appeals, 42 Ill. App. 3d 849, 356 N.E.2d 871 (1976) (judicial affirmation of a refusal of a special use permit for a drug addiction treatment center).

99 Cupaiolo, *supra* note 88, depicts exclusionary zoning practices as an unfortunate happenstance rather than a conscious effort.

mental health care, traditionally and as contemplated under federal programs.<sup>100</sup> Further, it is unlikely that either the local or federal government will act to effectuate the needed compromise. Absent pressure from above, local governments are unlikely to ease zoning restrictions of their own accord.<sup>101</sup> And zoning in general has long been regarded as the almost exclusive province of the state and local governments,<sup>102</sup> thus precluding preemptive federal action.

The few federal zoning cases decided during the past decade, several of which bear indirectly on exclusionary zoning of group residences for the mentally ill, affirm the fact that state and local governments are responsible for arranging land use systems to accommodate different communities. The Supreme Court has refused to entertain federal equal protection challenges to zoning on the grounds of de facto racial discrimination;<sup>103</sup> it has also denied certiorari in a case where the state court held that developing communities are obligated to provide a fair share of the region's low income housing.<sup>104</sup> Furthermore, the Court's scrutiny of definitions of "family" as used in zoning ordinances has resulted in invalidation only in the clear case where the definition penetrated the traditional,

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100 See text accompanying notes 43 and 46 to 60 *supra*.

101 A specific community is unlikely to perceive any benefits to it or its citizens by easing its exclusionary zoning practices, since the funding incentives tend to be channeled to or through the states and the narrow visions of community members may obscure the less tangible benefit of increased understanding of mental illness.

102 The Standard State Zoning Enabling Act was developed as a model for — not as a mandate upon — state governments. *Developments — Zoning, supra* note 38, at 1435. And in *Euclid, supra* note 92, zoning earned constitutional approval as "some aspect of the police power" — in the province of the states. 272 U.S. at 387. The involvement of the federal government in zoning per se has been minimal since zoning's inception. See *Developments — Zoning, supra* note 38.

It is of course overly simplistic to assume that the federal government does not influence local land use decisions in any way: federal funding incentives and contracts reach land use indirectly, as this subject exemplifies. See Freilich, *Awakening the Sleeping Giant: New Trends and Developments in Environmental and Land-Use Controls*, published in 1974 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 1-3 (1974) (Southwestern Legal Foundation, Dallas, Texas).

103 *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (plaintiffs had not proved discriminatory intent); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs lacked standing in the absence of a personal and immediate injury).

104 *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mt. Laurel*].

nuclear family unit,<sup>105</sup> while a less egregiously restrictive definition (excluding a group of college students) has been approved.<sup>106</sup> Thus, regardless of whatever else these cases may be read to say,<sup>107</sup> one may safely assume that the federal judiciary is not ready or willing to engage in local land use planning.

In approving zoning as a general matter, the Supreme Court over fifty years ago realized that the zoning power of local governments could not be limitless, for there would be "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."<sup>108</sup> Some state judiciaries have come to recognize that exclusionary zoning of group residences in general presents such a case; yet it is not clear that these decisions provide adequate precedent for the mentally ill. Furthermore, whether courts acting alone are competent to effect the necessary changes in state zoning law is doubtful. State-level legislation thus emerges as the most satisfactory method of resolving the conflicts among communities and governments inherent in this exclusionary zoning dilemma.

### 1. The Inadequacy of State Case Law

Persons desiring to provide community residential services for various client groups roughly analogous to the mentally ill,

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105 *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (the ordinance had resulted in a jail sentence for a woman who lived with her son and two grandsons, who were first cousins).

106 *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The end of the zoning ordinance legitimated by the Court was assuring "family values, youth values, and the blessings of quiet seclusion." 416 U.S. at 9.

107 See *In State ex rel. Thelen v. City of Missoula*, 543 P.2d 173 (Mont. 1975) [hereinafter cited as *Thelen*]. In upholding a state law preempting local exclusionary zoning of group residences, the Supreme Court of Montana read *Belle Terre*, *supra* note 106, to place the issue of exclusionary zoning in the province of legislatures, rather than the judiciary and thus as consistent with the legislation under discussion.

More broadly, these cases together may be read so as to cast doubts on exclusionary zoning of group residences for the mentally ill. That is, the Court has tacitly affirmed, or at least not refuted, the use of zoning to integrate communities. And the Court has recognized the validity of state definitions of "family," so that state legislation which would define and protect a group of mentally ill persons as a family would seem to be valid. An in-depth analysis of these cases clearly is beyond the scope of this note. See *Developments — Zoning*, *supra* note 38.

108 *Euclid*, *supra* note 92, at 390.

e.g., the mentally retarded or emotionally disturbed children,<sup>109</sup> have achieved significant successes in state court challenges to exclusionary zoning.<sup>110</sup> Yet, in terms of eradicating exclusionary zoning of those group residences, these successes largely are symbolic rather than sources of sound legal precedents. The rationales of these cases almost uniformly are unpersuasive<sup>111</sup> when applied to group residences for the mentally ill.

Perhaps the most typical ground for judicial overrule of exclusionary zoning (in keeping with the zoning mechanism most often used to attempt exclusion<sup>112</sup>) is a liberal construction of the term "family" as used in zoning ordinances. Thus, courts have found that, even though a group composed of two houseparents and up to ten unrelated mentally retarded or neglected children would not come within the words of a zoning ordinance's restrictive definition, it would nonetheless qualify from "outward appearances" to be "a relatively normal, stable and permanent family unit, with which the community is properly concerned."<sup>113</sup> When the outward resemblance to a tradi-

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109 This analysis does not encompass judicial treatment of group residences for other client groups, such as parolees, in any comprehensive fashion. Nor does it pretend to encompass all of the cases brought on behalf of the mentally retarded or emotionally disturbed.

110 Litigation results and strategies in the area of exclusionary zoning of group residences have been analyzed in Levey, Comment, *Municipal Corporations — Zoning*, 7 FORDHAM URB. L. J. 203 (1978); Wildgen, *supra* note 96; Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976); Kressel, *The Community Residence Movement: Land Use Conflicts and Zoning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975); Hong, *Exclusion of the Mentally Handicapped: Housing the Nontraditional Family*, 7 U. CAL.—DAVIS L. REV. 150 (1974).

111 There have been a few successes in litigation concerning group residences for the mentally ill; either the results were straightforward or the reasoning strained. *Township of Washington*, note 14 *supra*, (group residence: treating five former mental patients qualifies as a family within the broad definition of a single housekeeping unit); *Ganim v. Village of New York Mills*, 75 Misc. 2d 653, 347 N.Y.S.2d 372 (Sup. Ct. 1973) (a boarding house for the mentally ill is comparable to a boarding house in general for zoning purposes); *Zarek v. Attleboro Human Services*, No. 2450 (Bristol Sup. Ct. Mass. June 11, 1976) (home for 12 to 15 mental patients qualifies as an educational use, broadly defined, in light of the Massachusetts policy of normalization of the mentally ill).

112 See text accompanying notes 96 to 97 *supra*.

113 *City of White Plains*, *supra* note 26. Other cases relying at least in part on this rationale include *Hessling v. City of Broomfield*, *supra* note 26, *State ex rel. Ellis v. Liddle*, *supra* note 23, and the progeny of *City of White Plains*: *Committee for the Betterment of Mount Kisco v. Taylor*, 63 A.D.2d 650, 404 N.Y.S.2d 380 (1978) (ten children); *Incorporated Village of Freeport v. Ass'n for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct. 1977) (eight mentally retarded young women);



tional family fades, the force of this justification for affording favorable zoning to a group residence dissipates.<sup>114</sup> Clearly, a group composed of two houseparents and six mentally ill adults scarcely resembles "a relatively normal . . . family unit."<sup>115</sup>

Those seeking authorization for a group residence have also succeeded by arguing that the proposed home qualifies either for exemption according to state law or for favorable treatment according to local ordinance because of its educational use.<sup>116</sup> This approach requires depicting the group residence as a school<sup>117</sup> or asserting that it serves a school or educational purpose.<sup>118</sup> Both arguments succeed most smoothly when the home is in fact linked to the public school system<sup>119</sup> or when state law defines these terms broadly.<sup>120</sup> Applying this rationale to facilities housing adults who do not require continued education tends to strain the theory beyond its limits of credibility.<sup>121</sup>

A third rationale for invalidating restrictive zoning provisions rests on state-wide policy grounds. To block a residence by operation of a local zoning ordinance, so the argument goes,

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Group House of Port Washington, Inc. v. Bd. of Zoning and Appeals of the Town of North Hempstead, 82 Misc. 2d 634, 370 N.Y.S.2d 433 (Sup. Ct. 1975) (seven foster children); Moore v. Nowakowski, 46 A.D.2d 996, 361 N.Y.S.2d 795 (1975) (ten juveniles).

114 This may be true even where the client group is composed of children. *E.g.*, *Browndale International*, *supra* note 22; *Culp v. City of Seattle*, 22 Wash. App. 618, 590 P.2d 1288 (Ct. App. 1979).

115 *E.g.*, *People v. Renaissance Project, Inc.*, 36 N.Y.2d 65, 364 N.Y.S.2d 885, 324 N.E.2d 335 (1975) (narcotics rehabilitation residence with five to twelve clients does not constitute a single housekeeping unit). A rare decision finding a group of adults to constitute a family unit is *Oliver v. Zoning Comm. of Town of Chester*, 31 Conn. Sup. 197, 326 A.2d 841 (C.P. 1974) (eight mentally retarded residents constitute a single housekeeping unit; the facility had been a nursing home previously).

116 *See* Annot., 64 A.L.R.3d 1087 (1975).

117 *E.g.*, *Crist v. Bishop*, *supra* note 23.

118 *E.g.*, *Harbor Schools, Inc. v. Bd. of Appeals of Haverhill*, 366 N.E.2d 764 (Mass. App. Ct. 1977) (emotionally disturbed girls) [hereinafter cited as *Harbor Schools*]; *Armstrong v. Zoning Bd. of Appeals of Town of Washington*, 158 Conn. 158, 257 A.2d 799 (1969) (mentally disturbed, but not mentally ill, children).

119 *E.g.*, *Harbor Schools*, *supra* note 118; *In re Wiltwyck School for Boys, Inc. v. Hill*, 11 N.Y.2d 182, 182 N.E.2d 268 (1968) (six dormitories for delinquent children linked to public school system).

120 The definition relied upon in *Zarek*, *supra* note 111, is "the process of developing and training the powers and capabilities of human beings. . . . Education may be particularly directed to either the mental, moral, or physical powers and facilities, but in its broadest and best sense it relates to them all."

121 For a good try, *see Zarek, id.* The holding relies heavily on the state's broad definition of education.

would thwart the state policy favoring community care and treatment of the state's troubled or disadvantaged citizens.<sup>122</sup> Variations on the theme assign the group residence sovereign immunity from zoning as a governmental entity,<sup>123</sup> bring it within the exemptions afforded government agencies,<sup>124</sup> or rely on vague notions of preemption.<sup>125</sup> At first glance, this argument would appear to encompass group residences for the mentally ill as well as any other group residence, assuming the expression in state law of the requisite policy.<sup>126</sup> Yet the approach is highly problematic. Absent a clear legislative directive, there is nothing in a state policy favoring community treatment or care that inherently or logically overrules the state policy of local control of land use.<sup>127</sup> Thus, the state policy argument has prevailed primarily in three situations: in situations buttressing results based on the other two rationales,<sup>128</sup> in safe situations (*e.g.*, permitting the continuation of a nonconforming use),<sup>129</sup> and in situations where the two state policies have been ranked expressly by the legislature with residential care prevailing over local control of land use<sup>130</sup> (by no means the prevalent pattern).<sup>131</sup>

Thus, while it may be tenable to portray case law in the broad area of exclusionary zoning as more sympathetic to providers and residents than to hesitant neighbors, the case law is

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122 *E.g.*, *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 312 N.Y.S.2d 841 (1970) (six neglected children).

123 *E.g.*, *Hillsborough*, note 88 *supra*.

124 *E.g.*, *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976) (children's center).

125 *E.g.*, *Nowack v. Dep't of Audit and Control*, 72 Misc. 518, 338 N.Y.S.2d 52 (Sup. Ct. Special Term 1973) (youth center).

126 The use of this argument in successful zoning cases brought on behalf of the mentally ill is interesting: In *Township of Washington*, *supra* note 14, the court cited state policy but found no grounds to subordinate local zoning authority to it. The argument carried more weight in *Ganim* and *Zarek*, *supra* note 111.

127 See note 126 *supra*; see also *City of Newark v. Johnson*, *supra* note 24.

128 *E.g.*, *Ellis*, *supra* note 23, and *Harbor Schools*, *supra* note 118.

129 *Ganim*, *supra* note 111. The facilities which benefitted from the success of the cases cited in notes 122 to 125 and note 128, for whatever reasons, are viewed as less troublesome within the law.

130 Cases construing the state legislation discussed here which use that legislation as the grounds for a state policy argument are discussed in text accompanying notes 158 to 168 *infra*.

131 See text accompanying note 148 *infra*.

ultimately insufficient. It is a substantial leap from ordering a community to admit a home for the mentally retarded or children, to ordering a community to allow a facility housing mentally ill adults.<sup>132</sup> Thus far, case law has not provided the analytical support for taking that leap.

## 2. The Inadequacy of Judicial Resolutions

Even if case law provided adequate precedent for judicial overrule of exclusionary zoning of the mentally ill, it would be unwise to rely on the judiciary as the agent of reform.<sup>133</sup> The often tortuous course of a lawsuit, even a successful one, underlines some of the weaknesses of judicial resolution in this context.

To start, judge-made law arises only when instigated by an appropriate case.<sup>134</sup> Whether such a case will arise in a given state depends on fortuity and the relative resources and degrees of commitment of the litigants,<sup>135</sup> rather than on the legal system's need for the litigation. Thus, the proper case may never reach the judiciary's consideration if, for example, the prospective provider of the group residence is too poor to pursue costly litigation, the prospective provider never finds an economically feasible site, or a local zoning authority proves sympathetic and allows the group residence. There is no reason to assume that the litigant with the most convincing and representative case will be the litigant who makes it to court.

Assuming the appropriate case is indeed presented, it is still

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132 At least, the special fears of mental illness held by the American public, *see* notes 29 to 36 *supra*, may cause a court to think twice before extending what precedent there is to homes for the mentally ill. *See, e.g., Oliver, supra* note 115, where the court specifically distinguishes the mentally retarded from the mentally ill.

133 For a more complete analysis of the inefficacy of courts in the area of exclusionary zoning generally, *see*, Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976).

134 At the least, judge-made law must be predicated on a case presenting an appropriate fact situation to be minimally defensible.

135 Should there be a disparity in resources between the litigants here, it likely would work to the disadvantage of the residence providers. One may assume that the providers of group residence programs are not likely to be wealthy individuals or organizations. Resistant members of a community or their local government are more likely to be sufficiently funded to pursue litigation. *See* Cupaiolo, *supra* note 88, for a social worker's assessment of the expense, in time and money, of litigating in exclusionary zoning challenges.

problematic whether the court can fashion a holding of the requisite scope without exceeding its legitimate role. In the first instance, courts reviewing zoning decisions are bound by a fairly narrow scope of review<sup>136</sup>; to invalidate a local zoning ordinance as applied or on its face thus could well be construed as overstepping. Equally problematic is the issue of how far-reaching the decision should be, given that the typical court challenge to exclusionary zoning involves only one residence and one community.<sup>137</sup> Assuming the case reaches a court with a statewide jurisdiction,<sup>138</sup> its outcome will be restricted to the facts of the case in controversy (*e.g.*, establishment of the particular group residence in issue or invalidation of the challenged ordinance) potentially resulting in a patchwork pattern of restrictive and open areas. Such a pattern in turn would produce an undesirable clustering of group residences.<sup>139</sup> On the other hand, to use the litigated case as a springboard for a statewide rule may seem imprudent in an area where local peculiarities are factually crucial and highly valued.

Technical questions arise as well in the process of fashioning an appropriate holding. The multiplicity of exclusionary zoning mechanisms<sup>140</sup> means that a decision which would address the ordinance of one community would pass over those of other areas. For example, a judicial redefinition of "family" would not ameliorate exclusionary zoning when arduous requirements for special use permits must first be met. Further, jurispruden-

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136 See note 92 *supra*.

137 Theoretically at least, one could bring a class action suit on behalf of mentally ill residents denied community residential placements in an area in general due to exclusionary zoning; but see *Warth*, *supra* note 103, requiring personal and immediate injury prior to suits challenging restrictive zoning practices.

138 Presumably, judicial reform here to be truly effective must emanate from a state's highest court. It may also be that the legal structure of a state's authority to zone makes the uniform application of even a Supreme Court decision problematic. For example, zoning in Massachusetts has been (and perhaps still is) bifurcated, so that Boston and the rest of the state operate under separate bodies of statutory and case law. MASS. GEN. LAWS ANN. ch. 40A (West 1979). The same issue could arise where a state has home rule and general law cities with disparate sources of zoning power. See note 89 *supra* and note 167 *infra*.

139 See note 3 *supra*. For a journalist's description of the undesirable consequences of excessive concentrations of the mentally ill in a geographically confined area (not due to judicial action), see Koenig, *The Problem That Can't Be Tranquillized*, N.Y. Times, May 21, 1978, § 6 (Magazine), at 14.

140 See text accompanying notes 95 to 99 *supra*; see note 138 *supra*.

tial considerations militate against predicating a legal solution on strained constructions of ordinances which themselves address the controversy in an awkward fashion.<sup>141</sup>

Finally, problems of implementation of judicial decrees in this area loom large. One could expect several undesirable consequences to flow from the eradication of exclusionary zoning by judicial mandate without more, *e.g.*, a glut of hastily conceived and executed programs, and defensive efforts by local governments or private neighborhood groups to devise alternative methods of exclusion.<sup>142</sup> Courts attempting to block these results would find themselves serving as super-zoning boards, wasting scarce judicial resources while pursuing a legislative function.<sup>143</sup>

The risks in relying on judicial resolution of the exclusionary zoning dilemma are thus both practical and legal. And even if the problems are overcome once, they are still prone to repetition.<sup>144</sup> As one scholar notes: "Adjudication through the courts is often costly in terms of both time and money. Furthermore, decisions in this novel and complex area are rarely so definitive and final that issues are settled permanently."<sup>145</sup>

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The conflict over exclusionary zoning of the mentally ill is thus reflected in the struggle between the federal government, acting to return the mentally ill to life in the community, and local governments, acting to exclude the mentally ill. While recent action by state judiciaries may be laudable and favorable to

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141 See Levey, *supra* note 110, for an apt criticism of the approach of eradicating exclusionary zoning through a liberal construction of "family" on these grounds. See Zarek, for an example of the problem in the approach of deeming group residences educational uses.

142 See note 88 *supra*.

143 For critical commentary on the inefficacy and wastefulness of judicial reform in the zoning area, see the discussion of the activist New Jersey courts in the area of racially and economically exclusionary zoning in Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976). Equally instructive for the mental health realm is the series of opinions in Wyatt, note 78 *supra*.

144 For example, the authoritative opinion in *White Plains*, did not put an end to zoning dilemmas concerning group residences in New York, *supra* note 113.

145 Cupaiolo, *supra* note 88, at 208.

the interests of the mentally ill, it cannot be relied upon for the ultimate resolution of the conflict here.

In the words of one mental health professional:

Although such policy issues are complex and not easily resolved, state legislation, nevertheless, appears to offer the best opportunity for guaranteeing the right of the mentally disabled to live in residential communities in the least restrictive setting possible. Such legislation would also be the most effective means of preventing excessive clustering of facilities that can unfavorably alter the character of a neighborhood to the detriment of all.<sup>146</sup>

### III. RESOLUTION: STATE LEGISLATION TO INTEGRATE THE MENTALLY ILL INTO COMMUNITY LIFE

The solution of state legislation to prohibit exclusionary zoning of group residences for the mentally ill has garnered support within the legal community as well as within the mental health system. The 1978 report of the President's Commission on Mental Health advocated "state zoning laws . . . which preempt local zoning ordinances and permit small group homes for the mentally handicapped."<sup>147</sup> Indeed, during the 1970's, sixteen state legislatures enacted statutes pertaining to zoning of group residences.<sup>148</sup> Unfortunately, only a handful reached

<sup>146</sup> *Id.* at 210.

<sup>147</sup> TASK PANEL REPORTS, *supra* note 3, at 1388.

<sup>148</sup> ARIZ. REV. STAT. ANN. §§ 36-581 to 36-582 (Supp. 1979) (developmentally disabled); CAL. WELF. & INST. CODE §§ 5115-5116 (Deering Supp. 1979) (mentally disordered, otherwise handicapped, dependent or neglected children); COLO. REV. STAT. § 31-23-303 (1977) (developmentally disabled); MD. ANN. CODE art. 59A, §§ 19A, 19B, 20C (Supp. 1978) (mentally retarded); MICH. COMP. LAWS ANN. § 125.583b (Supp. 1980) (adults or children in general); MINN. STAT. ANN. § 462.357 (Supp. 1978) (mentally retarded or physically handicapped); MONT. REV. CODES ANN. §§ 11-2702.1 to .2 (Supp. 1977) (developmentally disabled, handicapped, alcoholics and drug addicts, youths, adults in need of foster care); N.J. REV. STAT. ANN. §§ 40:55D-66 to 66.2 (West Supp. 1980) (foster children, developmentally disabled, or mentally ill); N.M. STAT. ANN. § 3-21-1.C (1978) (mentally ill or developmentally disabled); N.Y. MENTAL HYG. LAW § 41.34 (Consol.) (Supp. 1978) (1978) (mentally disabled); OHIO REV. CODE ANN. § 5123.18 (Page) (Supp. 1977) (1977) (developmentally disabled); R.I. GEN. LAWS § 45-24-22 (Supp. 1978) (mentally retarded); TENN. CODE ANN. §§ 13-2402 to 2404 (Supp. 1978) (mentally retarded or physically handicapped); VT. STAT. ANN. tit. 24 § 4409(d) (Supp. 1979) (developmentally disabled or physically handicapped); VA. CODE § 15.10486.2 (Supp. 1979) (mentally retarded and other developmentally disabled); WISC. STAT. § 60.74(a) (1977) (faster children and others). Other states have legislation which acknowledges

group residences for the mentally ill,<sup>149</sup> thus rendering broad liberalization of zoning practices unlikely.<sup>150</sup> It is timely, then, to consider the form future legislation should take.<sup>151</sup>

The analysis presented here is not intended to suggest a model statute or even advocate features of universal appropriateness. Diversity among the fifty states in terms of governmental structure,<sup>152</sup> demographic patterns of the general population and the mentally ill,<sup>153</sup> mental health delivery systems,<sup>154</sup> socio-economic characteristics, and social philosophy, is significant and counsels against positing a model statute. Rather, the following is intended as a set of principles of wide applicability,<sup>155</sup> a starting point for individual state

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the intersection of zoning and group residences without resolving the issue, *e.g.*, N.H. REV. STAT. ANN. § 126-a:39 (Supp. 1977) or which one might argue applies to this context, *e.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979). At least one state expressly has declared that group residences are to conform to local zoning. LA. REV. STAT. ANN. § 154 28:206 West (1978).

149 Only five of the statutes by their terms or through liberal construction reach the mentally ill — California, Michigan, Montana, New York, Wisconsin.

150 See analysis in text accompanying notes 200 to 226 *infra*.

151 The analysis below should be of interest not only to state legislatures where laws covering zoning of group residences of any sort are lacking, but also to the legislatures of states whose laws do not encompass group residences for the mentally ill, since expansion of the current laws' coverage soon may be necessary. In terms of potential amendments to current provisions, the comments below should be considered even in those states where exclusionary zoning of the mentally ill has been treated in statutory law.

152 For example, some states may need to deal with issues of home rule charters, *supra* note 89, or bifurcated zoning systems, *supra* note 138.

153 The incidence of mental illness varies appreciably from state to state with the 1973 average being one mental patient to 578 non-mentally ill citizens. FINANCING MENTAL HEALTH CARE, *supra* note 43, at 72. The incidence within a state, one might assume, would vary as well (*e.g.*, between urban and residential areas). I question the accuracy of this statement and how the author is defining "mentally ill." There seems to be some inconsistency in the way states are categorized as reaching the mentally ill or not. For example, Montana's statute applies to the "developmentally disabled" and is categorized as being one of the states with statutes reaching the mentally ill. However, Arizona, Colorado, New Jersey, New Mexico, Ohio, Vermont, and Virginia statutes also apply to the "developmentally disabled," yet they are not categorized as reaching the mentally ill. Moreover, the New Jersey and New Mexico statutes specifically apply to the mentally ill but are not categorized as reaching the mentally ill.

Maryland, Minnesota, Rhode Island, and Tennessee statutes apply to the mentally retarded but are not categorized as reaching the mentally ill. Some clarification should be given.

154 As of 1973, twenty-one states had independent mental health agencies. In the remainder, mental health care was administered by state departments of health or social services or by hospitals or institutions. *Id.* at 74-75.

155 To reiterate the caveat set forth in note 1 *supra*, the scope of this Note is confined to group residences for the mentally ill. Some of what is said below may apply to

legislatures. The following analysis is designed to show that such legislation is valid under current law and to analyze that law critically in order to suggest improvements for future legislation.

### A. *Validity of State Legislation Generally*

Because preemptive state legislation in the area of exclusionary zoning is likely to require an alteration in a city's local land use,<sup>156</sup> it, by definition, diminishes the scope of the local government's authority in determining certain land use questions in the future.<sup>157</sup> It is, therefore, only prudent to preface a proposal for such legislation with an assessment of the likely success of challenges to it based on allegations of unlawful tampering with the proper province of local governments. While the analysis here may be of only a very general nature in the absence of application of a specific state constitution or statute, the conclusion may be stated with some assurance: current law indicates that, as a general matter, preemptive state legislation in the area of exclusionary zoning of group residences for the mentally ill would be held valid.

To start, the courts have expressly affirmed zoning legislation in two of the 16 states with statewide zoning statutes.<sup>158</sup> In passing on the validity of Montana's provision which liberalizes

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other group residence networks, but I make no pretensions that this is so. Of course, any legislation touching upon group residences for the mentally ill would do well to cover other group residence networks as well, since, from the land use perspective, the issues are inextricably linked.

156 Restrictive local zoning ordinances and practices would be rendered invalid; even liberal zoning ordinances might be changed so as to reflect the scheme of inclusion required under the legislation.

157 This assumes that the state's judiciary has not divested local authorities of their decisionmaking role here; few of the cases, if any, described in text accompanying notes 110 to 132 *supra* can be described as doing so.

158 Approval of the state legislation cited in note 148 *supra* has been rendered in several state decisions which cite the laws and rely on them in finding for the group residence providers: *Adams County*, *supra* note 25; *Bellarmine Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978) (group residence for mentally retarded children and foster parents constituting a "family" held not barred by a private restrictive covenant allowing a single-family private dwelling only) [hereinafter cited as *Bellarmine*]; *Township of Washington*, *supra* note 14; *Berger*, *supra* note 22; *Y.W.C.A. of Summit*, *supra* note 24. *Berger* in particular echoes the analysis of *Thelen*, text accompanying note 160 *infra*, so that it may be read to create a strong implication of constitutionality.



zoning laws for a wide range of group residences,<sup>159</sup> that state's supreme court declared:

While we recognize respondent city's arguments as to the desirability of maintaining local government control of zoning regulations in its city, there is no question that the power of the legislature over the city in this matter is supreme. The legislature can give the cities of this state the power to regulate through zoning commissions, and the legislature can take it away. . . .

Montana's legislature having determined that the constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather than that they be segregated in isolated institutions, is paramount to the zoning regulations of any city, it becomes our duty to recognize and implement such legislative action.<sup>160</sup>

The opinion underlines the two most direct and forceful grounds on which to hold legislation of this type constitutional in the face of challenges by local governments. To the extent that zoning power is delegated by state legislation (rather than inherent in local governments<sup>161</sup>), that power may be restricted by amendatory state legislation.<sup>162</sup> And once such power is recognized, the policy of fulfilling the needs of disadvantaged or troubled citizens through community care may be given precedence over local zoning by the legislature.<sup>163</sup>

Thus, in *City of Los Angeles v. California Department of Health*,<sup>164</sup> California legislation protecting a wide range of group residences from exclusion through zoning<sup>165</sup> warded off

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<sup>159</sup> See note 148 *supra*.

<sup>160</sup> *Thelen*, *supra* note 107, at 176-177.

<sup>161</sup> At least this is generally the case, see note 89 *supra*. See also text accompanying notes 164 to 168 *infra*.

<sup>162</sup> This principle is widely recognized in zoning law in general. ROHAN, *supra* note 89, at § 35.02.

<sup>163</sup> See text accompanying notes 122 to 126 for instances of the judiciary's ranking of these two interests in case law absent statutory guidance.

A starting point for analysis of what interests should prevail over conflicting zoning provisions is the test set forth in *Payne*, *supra* note 143, at 833: "Where local decision-making under delegated power would result in a significant adverse impact upon an unrepresented interest or which, even absent such demonstrable impact, touches upon very important functions traditionally reserved for state decisionmaking, the delegation [of zoning power] [should] be deemed unconstitutional."

<sup>164</sup> 63 Cal. App. 3d, 473, 133 Cal. Rptr. 771 (1976) (no particular home at issue).

<sup>165</sup> See note 148 *supra*.

two challenges used frequently to attack this type of legislation. The court there rejected a claim that the legislation was fatally flawed due to overbreadth by noting that the appropriate standard for state legislation is not conservatism but constitutionality.<sup>166</sup> More important, the court found the legislation valid as applied to "home rule" as well as general law cities<sup>167</sup>:

If the scheme of regulation involved in the case at bench is treated as classical zoning, it then may well be a municipal affair subject to charter city ordinance which is inconsistent with state law. [citations omitted] If, however, the scheme is considered one relating to governing the location of homes for the placement of handicapped persons, then it relates to a matter of statewide concern. The consequences of placement, treatment, and, hopefully, return of the handicapped to a productive and respected place in society is a subject that transcends municipal boundaries.<sup>168</sup>

*City of Los Angeles* thus again provides precedent for rejecting the arguments of overbreadth and "home rule" autonomy. The case provides support not only for the constitutionality of the laws but also for the proposition that they should be applied uniformly, local variations and political questions notwithstanding.

Case law authority from one state does not of course bind other states. However, there are still other means of precluding restrictive zoning. Legislation preempting restrictive zoning of group residences can be held valid under statutory exemptions in current zoning law or under the principle of sovereign immunity.<sup>169</sup> By invoking immunity, litigants may indeed argue successfully that general public interest concerns outweigh the need for strict compliance with local regulations.

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166 133 Cal. Rptr. at 774.

167 The crucial distinction between the two in this context is the disparity in sources of zoning authority.

168 133 Cal. Rptr. at 774.

169 There are of course differences between preemptive legislation on the one hand and exemption and sovereign immunity on the other, *e.g.*, local ordinances which exempt a use represent the volition of the local unit while preemptive state legislation represents pressure from a larger constituency; sovereign immunity as a judicial product depends on factual situations as they arise, rather than pre-ordained results as legislation does. Exemptions mandated by state law closely approximate the approach of legislation in this context. These arguments are presented by way of analogy, not direct application.

Exemption from local zoning has already been afforded by legislatures at all levels. Some state zoning enabling acts delimit expressly the authority of local zoning bodies vis-a-vis certain activities.<sup>170</sup> For example, the zoning enabling act for Massachusetts prohibits local zoning ordinances which regulate "the use of land or structures for religious purposes or for educational purposes" when owned by certain entities.<sup>171</sup> Further, some state zoning legislation contains more inclusive exemption clauses, *e.g.*, that governmental agencies or public uses may be exempted from local zoning upon determination by the appropriate state body.<sup>172</sup> Exemptions include, at one end, federal or state statutes which explicitly or implicitly exempt certain government functions from local zoning ordinances<sup>173</sup> and, at the other end, local zoning ordinances which exempt municipal, governmental, or public uses.<sup>174</sup>

In the absence of statutes providing for exemption or in the face of equivocal statutes, courts have found certain governmental or public uses immune from zoning under the doctrine of sovereign immunity.<sup>175</sup> Courts in different jurisdictions faced with different contexts have developed several tests by which to determine whether a judicially-created exemption should be granted, *e.g.*, superiority of government position, the governmental vs. proprietary distinction, and the availability of eminent domain.<sup>176</sup> A recent trend has been the development of a less formalistic approach — the balance of interests test — which asks courts to weigh "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served

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170 See R. ANDERSON & B. ROSWIG, *PLANNING, ZONING & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE UNITED STATES* (1966) for a state-by-state summary of uses afforded exemptions or favorable treatment in state zoning enabling acts.

171 MASS. GEN. LAW STAT. ANN. ch. 40A, § 3 (West 1979).

172 *Id.* See note 170 *supra*.

173 See generally Annot., 61 A.L.R.2d 970 (1958); FREILICH, *supra* note 102.

174 Annot., *supra* note 173.

175 *Id.*; ROHAN, *supra* note 89, at §§ 35.07 and (VI) 40.03.2. This is to be distinguished from sovereign immunity from liability in tort afforded state officials by statute.

176 These tests are summarized in *Hillsborough*, *supra* note 88. For a discussion of the various tests, see Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971).

thereby, the effect local land use regulation would have upon the enterprise concerned, and the impact upon legitimate local interests."<sup>177</sup>

A survey of governmental entities typically held outside the reach of the local zoning body yields a wide range, from sewage treatment plants and turnpikes to multi-family housing projects and parks.<sup>178</sup> Among the land use items often exempted from zoning restrictions completely or in part are schools<sup>179</sup> and hospitals.<sup>180</sup>

The favorable treatment afforded under present law to units such as hospitals and state office buildings argues for similar treatment of group residences for the mentally ill. In terms of environmental impact, *e.g.*, consumption of space, size of structure, noise, fumes, and traffic, group residences are less objectionable than the favored uses, since group residences by definition are in physical terms identical to the community's other homes. In terms of concerns ancillary to land use issues, such as peace and quiet and the tranquility of community residents, group residences should pose no greater threats than the favored uses. And group residences are equally deserving of relief from local regulation on the grounds that they perform an identifiable and valuable public function which extends beyond the local boundaries.<sup>181</sup>

Against this background of favorable case law and analogous authority, preemptive state zoning legislation benefitting group residences for the mentally ill should thus be deemed valid as an exercise of the various states' police power.

### B. *The Existing Legislation*

The sixteen zoning statutes already in effect<sup>182</sup> are far from

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<sup>177</sup> *Rutgers State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972). The *Hillsborough court*, *supra* note 88, is among those preferring this mode of analysis.

<sup>178</sup> R. ANDERSON, *supra* note 170; Annot., *supra* note 173.

<sup>179</sup> *Id.*; Annot., *supra* note 116.

<sup>180</sup> See note 178 *supra*; Annot., 27 A.L.R.3d 1022 (1969).

<sup>181</sup> See notes 4 to 41 *supra*.

<sup>182</sup> This discussion includes all sixteen of the acts cited in note 148 *supra* even though not all of them are on point in terms of client group.

identical; nonetheless, there is sufficient uniformity in their basic design and provisions to justify an overview.<sup>183</sup>

Generally, the statutes serve as amendments to their state zoning enabling acts; alternatively, they are included in mental health or public welfare codes.<sup>184</sup> Most of the statutes by their terms confine their reach to group homes serving only specified types of clients<sup>185</sup> and to facilities housing no more than a specified number of residents (generally six).<sup>186</sup> Others create several classes of group homes deserving different degrees of protection depending on the number<sup>187</sup> or type<sup>188</sup> of residents. Almost all of the statutes expressly limit their coverage to state-licensed facilities.<sup>189</sup>

Most of the statutes attempt to eradicate exclusionary zoning by process of definition, declaring that, for zoning purposes, group residences fitting the statutory definition are acceptable residential or single-family uses of property.<sup>190</sup> Most of the statutes do not provide for different zoning treatment in more or less restrictive zones, although a few of the provisions do take cognizance of this factor.<sup>191</sup> In most instances, the statutes impose one of several mechanisms by which the number and placement of the newly-defined residential uses within a city or town are to be controlled: dispersion limits (*i.e.*, group

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183 For a schematic comparison of eleven of the acts (Arizona, Maryland, New York, Tennessee, Vermont excluded), see 3 AMICUS 2:38-39 (1978).

184 The laws of Arizona, California, Maryland, New York and Ohio are found outside of the state zoning laws.

185 See note 148 *supra*.

186 See statutes in California, Colorado, Michigan, New Jersey, New Mexico, New York, Rhode Island, Tennessee, and Vermont, *supra* note 148.

187 See statutes in Arizona, Minnesota, Ohio, Wisconsin. The laws of Maryland, Montana and Virginia disregard the number of residents in a home, *supra* note 148.

188 Legislatures in Colorado and Wisconsin have approached the problem in this way. See note 148 *supra*.

189 The statutes of Montana, Rhode Island, Tennessee and Virginia fail to mention licensure. See note 148 *supra*.

190 Exceptions are: New Jersey (bar on discrimination between children in the state's foster homes and biological families), Ohio (certain homes are permitted uses), Virginia (local ordinances shall provide for these homes), Wisconsin (same as Ohio). See note 148 *supra*.

191 Ohio and Wisconsin distinguish among different residential zones. The sixteen statutes essentially are uniform in focusing on residential zones and failing to mention zoning treatment of group residences elsewhere, except by implication (*e.g.*, Virginia), note 148 *supra*.

residences must be a specified distance apart),<sup>192</sup> density ceilings (*i.e.*, a group residence may be denied entry into a community if its presence would raise the percentage of group residence occupants in the community above a fixed number),<sup>193</sup> or the special use permit.<sup>194</sup> The laws further allow localities to impose on group residences the safety and health restrictions applicable to similar structures.<sup>195</sup> Several of the acts provide procedures involving prior notice to the affected community and a negotiation process<sup>196</sup> or post-establishment community review.<sup>197</sup>

Beyond the general description above, the acts vary widely, not only in terms of the relative complexity or apparent simplicity of their methods,<sup>198</sup> but also in the strength of legislative conviction displayed by their language.<sup>199</sup>

### C. A Critique: Errors of the Past

Ultimately, the strengths and weakness of the statutes already in existence (and of any future legislation) will be revealed in their results — how well they accommodate the often divergent desires of the mentally ill and the mentally stable. In the interim, analysis of the provisions yields several grounds for reservations as to their efficacy.<sup>200</sup> The root of most

192 See statutes in Arizona, Colorado, Michigan, Minnesota, Vermont, Wisconsin, note 148 *supra*.

193 Wisconsin. See note 148 *supra*.

194 The laws of Arizona, Minnesota, Montana, Ohio and Wisconsin give specific approval to special use permits. This issue is less than clear in most states. *E.g.*, does the term "permitted" connote permitted as of right, or permitted by statutory grant only (which likely would entail a use permit)?

195 Some statutes do not specify this *per se*, but inferring exemption from regulations applicable to other family uses would be a difficult argument to maintain.

196 See statutes in Arizona, Michigan, New York, Ohio, *supra* note 148.

197 Wisconsin, *supra* note 148.

198 Compare the Rhode Island statute with that of Wisconsin, *supra* note 148.

199 Compare, *e.g.*, the language of the New Jersey statute ("No zoning ordinance shall, by any of its provisions or by any regulations adopted in accordance therewith . . .") with that of the New Mexico statute (community residences "may be considered a residential use of property."), *supra* note 148.

200 See ZONING FOR COMMUNITY HOMES: A HANDBOOK FOR LOCAL LEGISLATIVE CHANGE (Law Reform Project, Developmental Disability Law, College of Law, Ohio State University 1975) for a proposal of local legislation similar to much of that currently in force.

It should be noted at the outset that this analysis is not intended as a complete critique of any one of the acts, but rather as a challenge to certain features shared by all or some of the acts.

of the flaws in the statutes enacted to date is the narrowness of their vision. Viewing the exclusionary zoning dilemma as merely a zoning issue,<sup>201</sup> legislatures have provided solutions that operate within the strictures of zoning law and practices. In so doing, they have imported into their solutions the troublesome limitations of zoning itself: undue reliance on problematic definitions which may be re-worked to accomplish the forbidden end under a different guise; a substructure of regulations which also may accomplish what zoning itself may not do; and mechanistic approaches to allocational issues where case-by-case analysis is indicated.<sup>202</sup>

What is perhaps most striking about the approach of the present legislation is the uniformity of its method. While there is little reason to quarrel with the labeling of "group residences" as single family residential uses,<sup>203</sup> the approach itself is seriously flawed. "Residential use" does not uniformly appear in all zoning legislation<sup>204</sup>; nor does the term "residential use" denote *a priori* a use free from zoning restrictions. That is, residential uses themselves may be barred from areas where one may wish to establish a group residence.<sup>205</sup> Similarly, definitions of residential uses currently in local ordinances do not necessarily contemplate a structure that could feasibly be used for a group house residence program. Wealthy communities may attach restrictions on the term, such as set-back or acreage requirements, which make it economically impossible to establish a group residence under a qualifying residential use. Most of the statutes apparently would not disturb this situation.<sup>206</sup>

Furthermore, because local zoning authorities may construe the residential use definition as they see fit, the opportunity for communities to bar group residences through zoning

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201 See note 184 *supra*.

202 See note 190 *supra*.

203 The little reason that does exist would be that group residences are more than mere residences; they also are treatment modalities. See note 14 *supra*.

204 Admittedly, the term "residential" would seem to be one of wide usage, but whether it is of universal usage is doubtful.

205 It is more likely than not, however, that a group residence provider would prefer an area with other homes; yet economic forces, past land use patterns, etc., might combine to make a site in, for example, a light commercial zone appropriate.

206 See note 195, *supra*. Countenancing the application of separate local rules regarding safety, building specifications, etc., probably reflects implicit approval of restrictions in the zoning definitions themselves.

remains.<sup>207</sup> For example, the statutes do not by their terms preclude local zoning bodies from evading the impact of the legislation by eliminating the term from their ordinances altogether, by attaching (or retaining) prohibitive qualifications to the term, or by devising other terms to cover preferred uses (such as normal private homes) in order to exclude "residential uses" from the category.<sup>208</sup> Thus, reliance on the simple terminology of statutes is undesirable since legal definitions may be construed to reach an end not contemplated by the definition itself.

Second, devising a solution that operates within the zoning system retains the very procedures which in practice may diminish the impact of the legislation's apparent reform. In particular, the majority of the sixteen provisions already enacted expressly provide or imply that local zoning authorities may require group residences to acquire special use permits.<sup>209</sup> As noted above, the special use permit has been recognized under present zoning law as an effective means of excluding an undesired use.<sup>210</sup> The specific approval of the device by the state legislature might be viewed by local zoning authorities as justification for employing it frequently and rigorously to exclude group residences. In addition, some of the legislation as applied could still require a prospective group residence provider to apply for a variance or continuation of a nonconforming use.<sup>211</sup> These application procedures thus tend to be

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207 See *Developments — Zoning*, *supra* note 38, at 1624-1708. *Mt. Laurel*, *supra* note 104, is the landmark case in the area of economically exclusionary zoning. The issue most often arises when the exclusion operates to the detriment of racial minorities. One could argue, however, that the practice is even less defensible when it disadvantages the mentally ill, whose particular problems entail not only discrimination of a general nature, but also specific clinical and functional needs.

208 Admittedly, such approaches are prone to attack as relying to an impermissible extent on the terms while evading the spirit of the legislation. Yet conceivably a strict constructionist court might be convinced that a specific statute was meant only as a definitional guide and not as an enactment infused with a public purpose, particularly in the absence of clearly expressed legislative intent.

209 See note 194 *supra*.

210 See note 98 *supra*.

211 This can occur when the site of the residence is in a nonresidential area in which residential uses are conditional; where statutory language deeming group residences to be permitted residential uses is construed to require prior zoning board approval of such residences; or, where the structure to be used was previously nonconforming.



weighted against the applicant whose use is unpopular by vesting the decisionmaking authority in the zoning board (composed of community members) and by allowing opponents of the use to register their views without attempting to measure whether the expressed views are representative of the community consensus.<sup>212</sup> Thus, the burden of implementing the apparent reform instituted by the statutes may well fall on the group residence provider by virtue of zoning's procedural obstacles. And that burden may be a heavy one.

A third, related flaw in the current legislation is that, along with the definitional restrictions and procedural burdens of zoning itself, comes a substructure of ancillary regulations. Thus, the group residence that gains entry to a neighborhood through liberalization of a community's zoning ordinances would be subjected to its safety and health regulations, its building code, *etc.*<sup>213</sup> While compliance with these rules probably would be in the best interests of the residents and the community, it is possible that the rules could be unduly stringent or inapposite to the group residence context.<sup>214</sup> Another potential cause for concern is possible abuse of the inspection procedures,<sup>215</sup> since the enforcement of local health and building codes is a governmental function of comparatively low visibility, and attendantly low public accountability.

Fourth, most of the statutes contain provisions aimed at regulating the distribution of group residences among and within the states' communities. Because the thrust of the legislation is to resolve future particular cases with a single *a priori* rule, they resort to numerical schemes — the density and dispersion limits.<sup>216</sup> Both of these schemes are questionable, not only in terms of the numbers chosen, but also in terms of the legal theories underlying them and their probable practical consequences. The density limit relies on a notion that has earned

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212 For a general discussion of zoning and procedural due process, see *Developments — Zoning*, *supra* note 38, at 1502-550.

213 See note 195 *supra*.

214 This is most likely to be a problem in wealthy areas where community residential standards would exceed the means of a group residence program.

215 See Aviram, *supra* note 29, for a description of the problem from the mental health professional's perspective.

216 See notes 192 and 193 *supra*.

increasing support among some legal theoreticians — that certain public services should be allocated among and responsibility assumed by communities according to their fair share of a region's needs.<sup>217</sup> According to this theory, one could argue that it is defensible to set a ceiling on the percentage of a city's population composed of persons residing in group residences, so long as the figure corresponds to the percentage of persons needing residential placement services.<sup>218</sup> The "fair share" doctrine expounded by the New Jersey Supreme Court arguably allows such an allocation. Thus far, however, the doctrine has been construed to require communities to ease their restrictive land use policies, not make them more restrictive.<sup>219</sup> Extending the doctrine to support the density control scheme here thus would abort its rationale.

Similarly, the dispersion limit is designed to allow a community to mitigate the potentially undesirable consequences of a particular land use by dispersing incidences of the use, thereby dissipating their aggregate impact. The principle has been declared constitutionally sound — in the context of pornographic theaters.<sup>220</sup> However salient differences between pornographic theaters and group residences for the mentally ill — *e.g.*, the former exists primarily for private enjoyment while the latter serves an important public welfare function — make invocation of this "precedent" highly questionable.

The practical wisdom of the dispersion and density devices is also far from clear. Both devices are designed to restrict the number and location of group residences within a distinct geographical area by imposing an arbitrary ceiling, a ceiling which predicates the permissibility of a new program on the

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217 A seminal article in advocating a regional approach to determining land-use issues involving public services is Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PENN. L. REV. 515 (1957) [hereinafter cited as Haar]. The leading case authority for the notion is *Mt. Laurel*, *supra* note 104. *Cf. Township of Washington*, *supra* note 14, in which the court discounts *Mt. Laurel* as requiring assumption of responsibility for group residences on a regional basis.

218 Calculating the percentage would be difficult as a practical matter and raises numerous questions: Should the figure be calculated on a regional basis, or statewide? How often should it be updated? Should it distinguish among different group residence client groups?

219 *Cf. Township of Washington*, *supra* note 14; see *Developments — Zoning*, *supra* note 38, at 1624-1708.

220 *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

number and location of programs already established. The mechanisms thus prefer early-comers over late-comers without regard to the comparative qualities of their programs. Both schemes ignore the disparities among geographical areas and even neighborhoods in terms of socio-economic and physical characteristics, not to mention, incidence of mental illness<sup>221</sup> — the factors that should and do determine the appropriateness of a group residence site. Numerous undesirable results could flow from reliance on such schemes: a large region could lack a group residence altogether because all of the towns would be small enough to claim the density exemption; the benefits of geographical proximity could be denied a consortium of commendable programs by the dispersion provision; and an urban area could be seriously underserved because the small sector where group residences feasibly could be located is already full. The schemes thus suffer from the inherent weakness of all numerical cut-off schemes: regulating quantity is a poor means of assuring quality.

The statutes already enacted not only bring with them the problems endemic to zoning as a legal construct, but also the pressing concerns ignored by zoning. These concerns are both legal and factual.

Zoning alone does not constitute the entire legal system governing land use. As previously discussed, legal constructs such as sovereign immunity and second-level local regulations like building codes, also determine the use to which a piece of property may and probably will be put. Two legal instruments also remain by which private parties may affect the course of someone else's enjoyment of property — the tort action of nuisance and restrictive deeds and covenants. Both of these have been used to challenge group residences, with mixed success.<sup>222</sup> The speculative nature of a nuisance challenge to a proposed group residence renders such a suit a relatively minor obstacle to the establishment of group residences.<sup>223</sup> By con-

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<sup>221</sup> See note 153 *supra*.

<sup>222</sup> See notes 223 and 224 *infra*.

<sup>223</sup> In *Nicholson*, *supra* note 37, Connecticut's Supreme Court refused an injunction against the future operations of a halfway house for parolees on the grounds that fears regarding community disruption and lowered property values were too speculative. See also *Hillsborough*, *supra* note 88.

trast, courts have been receptive to assertions that restrictive zoning covenants are legally (if not practically) consistent with statewide legislation and have excluded group residences under that rationale.<sup>224</sup> Thus, even if the sixteen statutes discussed here could be said to solve conclusively the zoning dilemma, the broader and ultimate issue of whether a community lawfully may exclude a group residence could persist.

Finally, zoning by definition addresses only the land use ramifications of multifaceted social and political conflicts. Yet in the context of group residences for the mentally ill, numerous other obstacles operate simultaneously, *e.g.*, non-existent public education programs, incomplete supportive services networks,<sup>225</sup> and inadequate funding.<sup>226</sup> Thus, as an ultimate solution to zoning rules excluding the mentally ill, current legislation is a shortsighted response.

#### D. *A Critique: Suggestions for Future Laws*

As discussed above, the failings in present state legislation aimed at prohibiting exclusionary zoning of group residences derive from the narrowness of the legislation's operating premise — that exclusionary zoning is primarily a zoning problem. These failings could be remedied in large part by abandoning that premise in favor of a broader perspective — that exclusionary zoning is a multifaceted dilemma of exclusion, of which zoning is only the most easily identifiable part. A shift in premises calls for a shift in the approach of the legal solution. The following are very general suggestions concerning principles and mechanisms for future legislation in keeping with the broad view that the real problem here extends beyond the zoning arena.<sup>227</sup>

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224 In *Seaton*, *supra* note 88, California's legislation overruling exclusionary zoning practices was held not to bar enforcement of restrictive private covenants, while in *Bellarmino*, *supra* note 158, Michigan's legislation was held to bar enforcement of the same. See also *Berger*, *supra* note 22, which avoids the issue.

225 See Part I of this Note for a discussion of the importance of public education and support services to the success of a group residence.

226 See RETURNING THE MENTALLY DISABLED, *supra* note 6; Jacobs, *A Hard Look: Seeking the Best Care for the Mentally Ill*, San Francisco Examiner, Aug. 26, 1979, p. 1 (describing the difficulties in the California mental health services network even after the liberalization of zoning laws, due to insufficient funding).

227 Several of the suggestions here are incorporated in some of the present legisla-

First, to the extent that some of the difficulties in the present legislation (awkward and malleable definitions, procedures capable of skewing the legislation's intent, arbitrary allocation schemes, *etc.*) are endemic to zoning, the appropriate remedy is to circumvent completely the zoning structure. Thus, rather than defining the status as assigned group residences in local zoning ordinances, state legislation should remove group residences from the province of local zoning and zoning-related authorities altogether.<sup>228</sup> Extensive legal precedent supports the exemption of public uses from zoning.<sup>229</sup> And so long as an alternative system to regulate the establishment and operation of the homes replaces the imperfect control mechanism presently afforded by zoning, no practical deleterious consequences should result.

Second, the task of determining the placement of group residences in order to produce a mental health services network responsive to the needs of the state's mentally ill and mentally stable citizens should be vested in a state agency.<sup>230</sup> Exclusionary zoning of group residences poses a dilemma for the legal system in part because of the "lack of correspondence between the political boundary (of the decisionmaking government) and the functional problem."<sup>231</sup> Assigning ultimate authority and responsibility for a state-level problem<sup>232</sup> to a state-level agency could correct the incongruity. One could expect the consolidation of responsibility in one agency to heighten the sense of organization and expertise in the decision-making body. In particular, the assumption of responsibility by

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tion; where this is so, the notes cite the state. None of the present statutes, however, could be said to follow the pattern suggested here as a whole.

228 The Maryland and Ohio statutes appear at first glance to take this approach. Whether they really do is doubtful.

229 See notes 170 to 174 *supra*.

230 The New York and Ohio statutes provide for a role for the state's departments of mental health in the placement of group residences; whether the state agency or the local body has the first or final say is not clear.

Whether the most appropriate agency for the task here is the mental health department is open to serious doubt. One would prefer an agency whose expertise incorporates more than mental health issues, *e.g.*, an agency charged only with locating group residences.

231 Haar, *supra* note 217, at 515.

232 See note 43 *supra*.

a state agency could ease the confusion and imbalance now evidenced by exclusionary zoning by providing: a statewide plan, uniform standards for group residences, and procedures governing the establishment and continued operations of group residences.

First, the involvement of a state agency would no doubt even-tuate in statewide coordination; with such a scheme, group residences could be apportioned according to assessments of current and future regional mental health needs and community development patterns. As a pragmatic matter, the development and implementation of such a plan would assure the state's eligibility for federal financial assistance where grants are awarded according to the efforts of the state.<sup>233</sup> Furthermore, one would expect that a group residence network established pursuant to a statewide plan would better serve a state's citizenry than a network established haphazardly. In terms of land use, the institution of a state plan would serve the functional role of zoning, since it would establish its own set of expectations with regard to property use.<sup>234</sup>

Second, the involvement of a state agency charged with locating and regulating group residences would lead to the development of appropriate and comprehensive standards for group residences. Vesting the responsibility for defining the status of group residences in a state agency would at the very least demand a conscious policy and obviate the piecemeal approach of previous state endeavors. State licensure systems for group residences exist already<sup>235</sup>; expanding the licensure system to include land use criteria would complement that process. Of course, local variations in land use and community characteristics would be a key variable in the application of any standards. A comprehensive and cohesive set of standards, which include consideration of local peculiarities, should result in a system of group residences that meet not only the needs of the residents but also the concerns of neighborhoods.<sup>236</sup>

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233 See text accompanying notes 45 to 67.

234 *Developments — Zoning*, *supra* note 38.

235 For a description and analysis of a state's licensure provisions, see Plonavich, *Washington's Adult Group Home Regulations*, 13 GONZAGA L. REV. 813 (1978).

236 See Part I of this Note.

Third, implementation of a state plan and enforcement of the standards for group residences would necessitate a comprehensive study of the competing interests of neighborhoods and group residents. As described above,<sup>237</sup> the decision to permit a particular residence (both with and without preemptive state legislation) often is made first by local officials who are pressured by community groups or by private citizens. Given the public needs met by group residences,<sup>238</sup> this localized focus appears inappropriate; the procedural safeguards afforded by a state's administrative procedure act<sup>239</sup> would probably produce more equitable results. Further, the case-by-case analysis afforded by a license system could produce more refined results than the quota devices in current legislation.<sup>240</sup> A systematic approach to allocating community residences would necessitate solicitation of views of the general public and thus potentially educate the community and still some of the unfounded fears.<sup>241</sup>

A system of state planning and licensure exempting group residences from regulation, however, would be as ineffective as the legislation already in force, in the absence of provisions dealing with nuisance suits and private restrictive covenants. While it may be unnecessary to bar nuisance challenges altogether, legislation could attempt to mitigate their deleterious consequences by providing for state defense of the suit if the residence complies with the state's standards, creating a presumption in favor of the residence under the same circumstances, or devising a mechanism in the licensure application and renewal process which would afford the community a structured opportunity to express its views.<sup>242</sup> The threat posed by private restrictive covenants and deeds may also warrant some legislative action.<sup>243</sup>

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237 See text accompanying notes 98, 209 to 215, 222 to 224.

238 See text accompanying notes 7 to 18 *supra*.

239 State administrative procedure acts vary somewhat; for a general impression, see UNIFORM LAW COMMISSIONERS' REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1946, as amended 1958).

240 See text following note 219 *supra*.

241 See text accompanying notes 30 to 32 *supra* explaining why education of the public is so crucial here.

242 This has been done in Wisconsin, see note 148 *supra*.

243 See Arizona statutes, note 148 *supra*.

Finally, legislation purporting to eradicate exclusionary zoning of group residences for the mentally ill will involve novel areas of law<sup>244</sup> and controversial aspects of American society. To forestall limiting constructions of legislation, lawmakers would do well to state their intentions clearly. Of course, the strength of a legislature's commitment to the integration of the mentally ill into community life is most forcefully evidenced by complementary legislation providing funding. Regardless of whether such accompanying legislation exists, legislatures must spell out their intent to prohibit exclusionary zoning, as in the following California provision: "The Legislature hereby finds and declares: (a) It is the policy of this state . . . that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability."<sup>245</sup>

### *Conclusion*

In 1974, the United States Supreme Court held that zoning may be used to create residential neighborhoods where "family values . . . and the blessings of quiet seclusion . . . make the area a sanctuary for people"<sup>246</sup> The federally-sponsored deinstitutionalization movement of the past fifteen years has sought to find a place in residential communities for the mentally ill who are capable of leading relatively independent lives. Yet, the beneficiaries of "quiet seclusion" have sought to use zoning to exclude the mentally ill from their sanctuaries.

The burden of reconciling the needs of the mentally ill as recognized by the federal government and the self-protectionist concerns and defense mechanisms of communities and local governments lies with the states. Since efforts by state judiciaries are inadequate to the task, state legislation is necessary. In particular, preemptive state legislation which would exempt group residences for the mentally ill from regulation by zoning authorities and institute an alternative com-

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244 See generally MENTAL DISABILITY LAW REPORTER, *supra* note 1, and *Developments — Zoning*, *supra* note 38, for a sense of the rapid change in mental health and zoning laws.

245 CAL. WELF. & INST. CODE § 5115 (Deering Supp. 1979).

246 *Belle Terre*, *supra* note 106, at 9.



prehensive state-level planning and licensure system commends itself as a potential method of reform.

To resolve the conflicts underlying exclusionary zoning of the mentally ill, legislatures must recognize that the root conflict is a social one: a struggle between groups, which, as one scholar notes, view themselves as distinct, whether they are or not: "Physical inclusion in a community is not enough; social inclusion, a willingness among community members to allow a decrease in their social distance from the mentally ill living among them, is necessary for true integration."<sup>247</sup>

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<sup>247</sup> LAMB, *supra* note 12, at 53.